(28,761)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE AND ELIZABETH TERRACE, HIS WIFE, AND N. NAKATSUKA, APPELLANTS,

vs.

LINDSAY L. THOMPSON, ATTORNEY GENERAL OF THE STATE OF WASHINGTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

INDEX.

	Original.	Print.
Names and addresses of counsel	1	1
Record from the district court of the United States for the western district of Washington	2	1
Bill of complaint	2	1
Motion for temporary injunction	9	5
Order setting date for hearing cause	11	6
Notice of hearing	12	7
Affidavit of Lindsay L. Thompson in opposition to motion for preliminary injunction	14	8
Motion to dismiss and service	16	10
Amended motion to dismiss	18	11
Memorandum opinion, Cushman, J., on application for temporary injunction	19	12

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	Original.	Print.
Order granting leave to file amended bill of complaint....	37	24
Amended bill of complaint.....	38	25
Motion to dismiss.....	45	29
Order denying injunction *pendente lite*.....	47	30
Judgment of dismissal.....	48	31
Petition for appeal.....	49	32
Assignment of errors.....	50	33
Order allowing appeal.....	53	35
Order fixing bond.....	54	35
Bond on appeal.....	55	36
Citation and service (copy).....	57	37
Præcipe for transcript.....	60	39
Clerk's certificate.....	62	40
Citation	63	41

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2 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132-E.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDLEY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, sitting in equity:

Frank Terrace and Elizabeth Terrace, his wife, citizens of the United States and of the State of Washington and residents of the Western District of Washington, and N. Nakatsuka, a subject of the Emperor of Japan and a resident of the Western District of Washington, bring their bill of complaint against Lindley L. Thompson as Attorney General of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington.

And thereupon the plaintiffs bring their complaint and show unto your Honors as follows:

I.

That plaintiffs suing, on behalf of themselves and others similarly situated bring this bill of complaint against said Lindley L. Thompson as the duly elected, qualified and acting Attorney General of the State of Washington.

II.

That the value of the matter in dispute herein between each plaintiff and the defendant exceeds the sum of $3,000.00, exclusive
3 of interest and costs.

The jurisdiction of this Honorable Court is invoked because of and by reason of the Federal question involved in this suit and equity jurisdiction, and because plaintiffs have no adequate remedy at law.

III.

That the plaintiffs Terrace are now and for a number of years last past have been the owners of the following described real estate lying and being in King County, State of Washington, to-wit:

The Southwest quarter (S. W. ¼) of the Southeast quarter (S. E. ¼), and Lot Five (5) of Section Thirty-six (36), Township Twenty-three (23) North, Range Four (4) East of the Willamette Meridian.

That said real estate is particularly adapted to raising vegetables, and for a number of years last past has been, and is now being, devoted to that and agricultural purposes. That the plaintiff N. Nakatsuka is a capable farmer and is in all respects a desirable person to become a tenant of said real estate. That the plaintiffs Terrace desire to lease said real estate to the plaintiff N. Nakatsuka for the period of five years, and the plaintiff N. Nakatsuka desires to accept such lease, and but for the Act of the State of Washington, hereinafter specifically mentioned, the plaintiffs would execute a lease of said real estate from the plaintiffs Terrace to the plaintiff N. Nakatsuka for a period of five years from this date. N. Nakatsuka, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he has produced and desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and "if he is prevented from leasing land for the
4 purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the Treaty hereinafter mentioned."

IV.

That there was enacted by the Legislature of the State of Washington, in the year 1921, an Act entitled "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing Sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 8, 1921.

V.

That the defendant Lindley L. Thompson, as the Attorney General of the State of Washington, has threatened to, and will enforce said Act in each and all of its terms, and the whole thereof, and particularly against these plaintiffs in the event that they enter into a lease of said real estate for the purpose and terms aforesaid, will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute these plaintiffs criminally for an alleged violation of said Act, above mentioned, and the said Act is in its terms so drastic and the penalties attached to a violation of the terms thereof are so great, that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said Act of the Legislature above mentioned, and unless this Court shall determine the validity of said Act in this proceeding, said plaintiffs will be compelled to submit to said Act whether the same be valid or invalid, and thereby be deprived of their property without due process of law and denied the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

VI.

That said Act of the Legislature of the State of Washington above mentioned, is in violation of and contrary to Section 33 of Article II of the Constitution of the State of Washington; and protection of the provisions of said Section are hereby expressly invoked by the plaintiffs and each of them.

VII.

That said Act of the Legislature of the State of Washington, above mentioned, is in violation of and contrary to the existing Treaty between the United States of America and the Empire of Japan, and particularly Article I thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident to or necessary for trade upon the same terms as native citizens of the United States of America; and the protection of said Treaty and *and* of Article I thereof is especially invoked by these plaintiffs and each of them.

VIII.

That said Act of the Legislature of the State of Washington is in contravention of Section 3 of Article I of the Constitution of the State of Washington in that it deprives these plaintiffs of property without due process of law; is in contravention of Section 12 of Article I of the Constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not

equally belong to all citizens; and protection of the provisions of said Sections of Article I of the Constitution of the State of Washington is hereby specially invoked by the plaintiffs and each of them.

6

IX.

That said Act of the Legislature of the State of Washington above mentioned, is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law; and protection of said Section 1 of the Fourteenth Amendment to the Constitution of the United States is hereby specially invoked by the plaintiffs and each of them.

X.

That if the plaintiffs are not permitted to enter into a lease of said real estate, as aforesaid, and on the terms above mentioned, a large and irreparable loss will occur to them and each of them, and the plaintiffs have no adequate remedy at law but are relievable only in a court of equity.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

1. That Lindley L. Thompson, as Attorney General of the State of Washington, be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this Court from bringing, directly or indirectly, and from permitting to be brought directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said Act of the Legislature of the State of Washington, above mentioned, against these plaintiffs, or either of them, upon their executing or attempting to execute a lease of real

7 estate above mentioned for the above mentioned term, or any other person, or corporation similarly situated, and from causing the plaintiffs, or either of them, or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the complainants, or either of them, from executing and delivering such lease on said real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendant, requiring him to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the hearing the aforesaid Act passed by the Legislature of the State of Washington be declared to be unconstitutional,

illegal and void and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpœna may issue to defendant requiring him to answer this bill of complaint fully and truthfully, but not on oath, an oath hereby being waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

JAMES B. HOWE.
E. HEISTER GUIE.
DALLAS V. HALVERSTADT.

8 THE UNITED STATES OF AMERICA,
Western District of Washington,
Southern Division, ss:

Frank Terrace and Nakatsuka, each being first duly sworn on oath deposes and says for himself: I am one of the plaintiffs named in the foregoing bill of complaint; I have read the foregoing bill of complaint, know the contents thereof, and the same is true to my own knowledge; that I make this verification in behalf of my co-plaintiff as well as in my own behalf.

FRANK TERRACE.
N. NAKATSUKA.

Subscribed and sworn to before me this 11th day of June, 1921.
[Notarial Seal.] DALLAS V. HALVERSTADT,
Notary Public in and for the State of Washington, Residing at Seattle.

Indorsed: Filed in the United States District Court Western District of Washington, Southern Division, Jun. 13, 1921, 2:40 P. M., F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

9 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDLEY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Motion for Temporary Injunction.

Come now the above named plaintiffs and upon their verified bill of complaint herein move the Court for a temporary injunction re-

straining the above named Lidley L. Thompson, as Attorney General for the States of Washington, during the pendency of the above entitled action from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing the Act of the Legislature of the State of Washington for the year 1921, entitled, "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing Sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 8, 1921, against these plaintiffs or either of them upon their executing or attempting to execute a lease on the real estate described in the bill of complaint herein, upon the terms therein mentioned. or any other person or corporated similarly situated, and from causing the plaintiffs or either of them or any other person or corporation similarly situated to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them from executing and delivering a lease as described in the bill of complaint on the real estate in said bill of complaint mentioned.

JAMES B. HOWE.
E. HEISTER GUIE.
DALLAS V. HALVERSTADT.

Indorsed: Filed in the United States District Court Western District of Washington Southern Division, Jun. 13, 1921, 2:40 P. M., F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDLEY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Order.

The Court having considered the verified bill of complaint duly filed in the above entitled suit, and the motion of the plaintiffs for a temporary injunction therein, and it appearing to the Court that the suit is one requiring the presence on the hearing of the application for a temporary injunction of three judges, on- of whom shall be a Circuit Judge of the United States.

It is by the Court ordered that the application for such temporary injunction be heard on the 24th day of June, 1921, at two o'clock in the afternoon, in the United States District Court at the court house thereof in the City of Tacoma, Pierce County, Washington.

EDWARD E. CUSHMAN,
United States District Judge.

Dated June 14th, 1921.

Indorsed: Filed in the United States District Court Western District of Washington, Southern Division, Jun. 14, 1921, 2:10 P. M., F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

12 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDLEY L. THOMPSON, Attorney General of the State of Washington, Defendant.

Notice.

To Honorable Louis F. Hart, Governor of the State of Washington, and Honorable Lindley L. Thompson, Attorney General of the State of Washington:

You and each of you are hereby notified that Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka have filed their verified bill of complaint herein in the District Court of the United States for the Western District of Washington, Southern Division, against Lindley L. Thompson, as Attorney General of the State of Washington, praying that said Attorney General be restrained provisionally, preliminarily and perpetually by the order and injunction of the above Court from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing the Act passed by the 1921 Legislature of the State of Washington, entitled, "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing Sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington," and approved March 8, 1921, against the plaintiffs or either of them upon the execution or attempting to execute a lease of the real estate described in the bill of complaint upon the terms therein mentioned, or any other person or corporation simi-

larly situated, and from causing the plaintiffs or either of
13 them or any other person or corporation similarly situated to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them from executing and delivering such lease on said real estate. The motion for such temporary injunction will be heard in the District Court of the United States at the court house thereof in the City of Tacoma, Pierce County, State of Washington, on the 24th day of June, 1921, at the hour of 2:00 o'clock P. M. or as soon thereafter as counsel can be heard.

JAMES B. HOWE.
E. HEISTER GUIE.
DALLAS V. HALVERSTADT.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 14 1921, 2:10 P. M. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

14 In the United States District Court for the Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Affidavit of Defendant in Opposition to Motion for Temporary Injunction.

STATE OF WASHINGTON,
County of Thurston:

Lindlay L. Thompson being first duly sworn on oath deposes and says: That he is the attorney general of the state of Washington, and the defendant herein; that he has not knowledge or information of the alleged contemplated lease described in the bill of complaint herein and that consequently he has never threatened to institute any action against the plaintiffs or any of them; that he intends to enforce the provisions of chapter 50, Laws of Washington of 1921, fairly and impartially unless restrained from so doing by the order of a court of competent jurisdiction, but that it is not his intention to enforce said law in such a manner as to deprive any persons of any rights given to them by the Constitution of the United States, or by any existing treaty between the United States

any any foreign nation; that in the enforcement of said law he intends only to bring such proceedings as are expressly authorized by said law, and that he disclaims any intention of bringing any proceedings either criminal, at law or in equity, which said chapter 50, and the facts as they may hereafter appear do not empower and direct him to bring.

15 Deponent further says that should the lease described in the bill of complaint herein be executed, and the fact that said lease has been executed reported either to the deponent or the prosecuting attorney of the county in which said land is located, and should he be convinced after an investigation that said lease has been executed in violation of said chapter 50, that he would then institute not more than two proceedings in the courts of the state of Washington, one a criminal proceeding against the plaintiffs Frank Terrace and Elizabeth Terrace, and the other a proceeding to escheat to the state of Washington the interest of the lessee in said property, and that should he fail to prevail in said actions in the appellate courts he would not thereafter prosecute any further legal proceedings against these plaintiffs or any of them.

LINDSAY L. THOMPSON.

Subscribed and sworn to before me this 24th day of June 1921.

[Notary Seal.] O. R. SCHUMANN,
Notary Public in and for the State of Washington, Residing at Olympia.

Service admitted June 24, 1921.

JAMES B. HOWE.
E. HEISTER GUIE.
DALLAS V. HALVERSTADT.

Indorsed: Filed in the United States District Court Western District of Washington, Southern Division. June 24 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

16 In the United States District Court for the Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Motion to Dismiss.

Comes now the defendant, Lindsay L. Thompson, as attorney general of the state of Washington, and moves the court to dismiss the bill in this cause because said bill does not state any matters of equity entitling plaintiffs to the relief prayed for, nor are the facts as state- sufficient to entitle plaintiffs, or any of them to any relief against this defendant.

Wherefore defendant prays the judgment of this court whether he shall further answer and that he be dismissed with his costs.

L. L. THOMPSON,
Attorney General,
Solicitor for Defendant.

17 STATE OF WASHINGTON,
County of Thurston, ss:

E. W. Anderson being first duly sworn on oath deposes and says: That he is over twenty-one years of age, a citizen of the state of Washington and is employed in the office of L. L. Thompson, attorney general, attorney for the defendant herein, That upon the 30 day of June, 1921, he served a copy of the attached motion to dismiss upon D. V. Halverstadt, one of the attorneys for the plaintiffs herein by depositing a true copy of said motion to dismiss in a sealed envelope, postage fully prepaid thereon, addressed to D. V. Halverstadt, Marion Building Seattle, Washington, and depositing said envelope in the United States Post Office at Olympia, Washington.

E. W. ANDERSON.

Subscribed and sworn to before me — 30 day of June, 1921.
[Notary Seal.] M. H. WIGHT,
Notary Public in and for the State of Washington, Residing at Olympia.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 1, 1921. F. M. Harshberger, Clerk, by Ed M. Lakin, Deputy.

18 In the United States District Court for the Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Amended Motion to Dismiss.

Comes now the defendant Lindsay L. Thompson, as Attorney General of the State of Washington, the parties hereto having stipuated that he may file his amended motion to dismiss, and moves the court to dismiss the bill of complaint filed herein for the reasons and upon the ground that, as appears upon the face thereof:

1. Said bill of complaint does not state any matters of equity entitling the plaintiffs, or any of them, to the relief prayed for;

2. Said bill of complaint does not state facts sufficient to entitle plaintiffs, or any of them, to any relief against this defendant;

3. The plaintiffs, and each of them, have a plain, adequate, complete and speedy remedy at law.

Wherefore defendant prays the judgment of this court whether he shall further answer and that he be dismissed with his costs.

L. L. THOMPSON,
Attorney General,
Solicitor for Defendant.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 29, 1921. F. M. Harshberger, Clerk, by Ed M. Lakin, Deputy.

19 In the District Court of the United States, Western District of Washington, Southern Division.

In Equity.

No. 132–E.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Complainants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Memoran n Decision on Application for a Temporary Injunction.

Filed July 25, 1921.

James B. Howe, Esq., E. Heister Guie, Esq., Dallas V. Halverstadt, Esq., for complainants.
L. L. Thompson, Attorney General, for defendant.

Before Hon. William D. Gilbert, C. J., Hon. Edward E. Cushman, D. J., Hon. Jeremiah Neterer, D. J.

CUSHMAN, *D. J.*:

The bill alleges that the complainants Terrace, owners of certain lands in this District, desire to lease such lands to the complainant Nakatsuka, a subject of Japan, who desires to lease them from them, and that he is engaged in farming and trading wholesale and retail in farm products; that such lease will be prevented by defendant's enforcement of Chapter 50 Laws of Washington, 1921, commonly known as the "Alien Land Bill". It is alleged that the result will be that the complainant Nakatsuka

"if he is prevented from leasing land for the purpose of producing such farm products for such trade, * * * will be prevented from engaging in trade and the incidents of trade as he is authorized to do under the Treaty hereinafter mentioned."

20 It is alleged that the act in question is contrary to the Fourteenth Amendment to the Constitution of the United States; to Article I of the Treaty with Japan; and Sec. 33, Article II of the Constitution of the State of Washington.

The act provides, not only for the forfeiture of the lands affected, but that whoever conveyes lands to an alien shall be guilty of a gross misdemeanor, the punishment for which may be a year's imprisonment in jail. This, we conclude, is such a severe punishment as to prevent persons affected from resorting to the courts to de-

termine the validity of the statute in question, and that, therefore, the remedy at law is not sufficient (Ex parte Young, 209 U. S., 123). The remedy at law is also inadequate as to the complainant Nakatsuka (Raich v. Truax, 219 Fed. 273, at 283).

Rast v. Van Deman & Lewis (240 U. S., 342, 355, 368) and Tanner v. Little (240 U. S. 369) have no application. In those cases the statute attacked required the payment of a license fee. In such cases an edequate remedy at law exists because, after payment of the license tax, suit can be had for its re-payment. For the same reason M'Cormack Bros. Co. v. Tacoma (201 Fed. 374) is inapplicable, as well as for the further reason that the plaintiff in such case was a corporation which could not be imprisoned for failure to pay the license, being only liable for the payment of a small fine. In such a case the remedy at law would not, necessarily, be inadequate.

The Constitution of the State of Washington provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall
21 not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition" (Sec. 33, Art. II).

The Act in question defines "Land" as follows:

"'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen." (Sec. 1. (b); Laws 1921, Chap. 50, p. 156).

Under the foregoing language, it is not necessary to consider the question of whether at common law a leasehold interest is personalty or realty, for, without doubt, by the foregoing, it is intended to include leases of agricultural lands.

The act also provides:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;" (Sec. 1, (a).

There is nothing in the bill as to the length of time for which complainant Nakatsuka desires to lease the lands, or for which it will be necessary to lease them.

There is no allegation in the bill as to whether the complainant Nakatsuka has, or has not declared his intention to become a citizen of the United States. All that is disclosed by the bill touching his eligibility for citizenship is the allegation that he is a subject of the Emperior of Japan. There is a possibility that included among the subjects of the Emperor, there are Caucasians or "white persons."

Congress has, by section 2169 R. S. (U. S. Comp. Stat. 4358) limited the right of naturalization to those aliens being "free white persons and to aliens of African nativity and to persons of African descent."

We feel justified in considering the bill as though it were alleged that Nakatsuka had the prevailing ethnological characteristics of his fellow-subjects, and that he had not declared his intention to become a citizen. He is, therefore, not a "white person" within the meaning of Section 2169 R. S. (U. S. Comp. Stat. sec. 4358).

In re Young, 198 Fed., 175;
In re Saito, 62 Fed., 126;
In re Geronimo Para, 269 Fed., 643.

Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file a declaration of intention to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so "in good faith."

A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary.

Chirac v. Chirac, 2 Wheat., 259, 272;
Hauenstein v. Lynham, 100 U. S., 483, 484;
De Vaughan v. Hutchinson, 165 U. S., 566, at 570;
Clarke v. Clarke, 178 U. S., 186;
Blythe v. Hinckley, 180 U. S., 333.

If a State constitution or statute conflicts with the treaty, it is either void or suspended during the existence of the treaty for by Article VI of the Constitution of the United States it is provided:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall

bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Martin v. Hunter, 1 Wheat., 304;
Carneal v. Banks, 10 Wheat., 181;
Hopkirk v. Bell, 3 Cranch, 454;
Geofrey v. Riggs, 133 U. S., 258;
Ware v. Hylton, 3 Dall., 199;
Chirac v. Chirac, 2 Wheat., 259;
Hauenstein v. Lynham, 100 U. S., 483 at 488;
Missouri v. Holland, 252 U. S., 416 at 434;
In re Stirud's Estate, 58 Wash., 339;
State ex rel. Tanner v. Staeheli, 12 Wash. Dec., 288.

This brings us to the question of the terms of the treaty with Japan with which the act is alleged by the bill to conflict.

The only portion of the treaty material to be considered is that part of Article I providing:

"The citizens and subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." (37 Stat. at L., p. 1504).

The lasting impression created by the foregoing language is that it was intended to withhold the right to own or lease agricultural lands. This impression becomes fixed upon consideration of the fact that this, in substance, was true at common law. (Coke upon Littleton, Book 12 *b*).

24

A law of California (Laws of 1913, p. 113) is, in its general purport, similar to the act herein question, although by Section 2 of that act aliens were permitted to lease lands for a term of not over three years.

A controversy arose concerning the validity under the treaty of the California Act between the Department of Foreign Affairs for the Empire of Japan and our own Secretary of State. In the progress of the exchange of views between the officials so representing the two Governments, the Secretary of State found the act not to violate the treaty and, in part, said:

"This treaty was based upon a draft presented by the Imperial Government. In Article I of this draft there is found the following clause:

"'3. They (the Citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' IT THUS APPEARS THAT THE RECIPROCAL RIGHT TO LEASE LAND WAS CONFINED TO 'RESIDENTIAL AND COMMERCIAL PURPOSES,' AND THAT THE PHRASES 'INDUSTRIAL' AND 'OTHER LAWFUL PURPOSES,' WHICH WOULD HAVE INCLUDED THE LEASING OF AGRICULTURAL LANDS, WERE OMITTED.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that
25 the law applicable in the United States in this regard was that of the respective States. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject Baron Uchida said:

'In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the States, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate States.*'

"In quoting the foregoing passage I have italicised the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese Ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from States in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that State for agricultural purposes for a term not exceeding three years, MAY BE HELD TO GO BEYOND THE MEASURE OF PRIVILEGE ESTABLISHED IN THE TREATY, WHICH DOES NOT GRANT THE RIGHT TO LEASE AGRICULTURAL LANDS AT ALL; and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the States, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of

satisfaction for its denial were perfectly understood and accepted." (Letter of William Jennings Bryan to Viscount Chinda, July 16, 1912, "Annex No. 7," pp. 17 & 18, "Controversy—United States and Japan—California Question," Congressional Library JV 6888 C2 J4). (Italics ours.)

In the case of Sullivan v. Kidd, decided January 3, 1921, (No 6 U. S. Supreme Court Advance Opinions p. 192 at 195), the court said:

"While the question of the construction of treaties is judicial in its nature, and the courts, when called upon to act, should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the government.
26 charged with the supervision of our foreign relations, should be given much weight."

A clear intention being shown not to supersede, in the particular now in question, the State's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former.

The language of the treaty is:

"and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *." (37 Stat. at L., 1504.)

In the most liberal construction of this language that may be indulged in, it cannot fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade.

Kidd v. Pearson, 128 U. S., 1;
U. S. v. E. C. Knight Co., 156 U. S., 1;
Joyce v. Auton, 179 U. S., 591 at 594;
Capitol City Dairy Co. vs. Ohio, 183 U. S., 238, 245.

Buchanan v. Warley (245 U. S., 60 at 73) is, no doubt, authority supporting the right of Terrace to invoke this treaty provision, were the act in conflict with the treaty, but it is not.

Aliens may only come to the United States upon such conditions and terms as our Government sees fit to impose. By the treaty, the right to lease real estate in the United States for agricultural
27 purposes is withheld. (Hauenstein v. Lynham, 100 U. S., 483.) It might have been, by Congressional enactment, prohibited (U. S. v. Repontigney, 72 U. S., 211); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which

left the State free to prohibit it. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the State to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen land owner the broad construction of his rights under the Fourteenth Amendment for which contention is made. The citizen land owner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.

That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves.

Slaughter-House cases, 16 Wall. (83 U. S.), 36;
Buchanan v. Warley, 245 U. S., 60 at 76 & 78.

By the amendment, members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.

"In giving legislative aid to these constitutional provisions Congress enacted in 1866, c. 31, sec. 1, 14 Stat. 27, (Rev. Stats. sec. 1978) that:

" 'ALL CITIZENS of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, PURCHASE, LEASE, SELL, HOLD, AND CONVEY REAL AND PERSONAL PROPERTY.'

"And in 1870, by c. 114, sec. 16, 16 Stat., 144, (Rev. Stats., sec. 1977) that:

"ALL PERSONS within the jurisdiction of the United States
28 shall have the same right in every State and Territory TO MAKE AND ENFORCE CONTRACTS, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other." (Buchanan v. Warley, 245 U. S., 60 at 78.) (Italics those of this court.)

These statutes show that Congress then understood the Fourteenth Amendment did not forbid the State the right to deny ownership of lands within its boundaries to aliens.

The act of 1897 (U. S. Comp. Stats. secs. 3490-3495), prohibiting the ownership of land by aliens in the territories of the United States, provides that the denial of such rights shall not apply to any alien who shall become a bona fide resident of the United States. By section 3491 Comp. Stats., Congress gave all alien bona fide residents, including the Japanese, rights denied by the act in question; but it is limited to the territories and has no application in the states.

The court in Buchanan v. Warley (supra), holding the State stat-

ute unconstitutional, accentuated the fact that the discrimination of the statute was "solely because of color" and, again, "this interdict is based wholly upon color, simply that and nothing more."

In the course of the controversy between the State Department and the Minister for Foreign Affairs of the Empire of Japan over the validity of the California statute under the treaty already mentioned, the legal adviser for the State Department said:

"* * * the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship." (Annex No. 8," p. 24, "Aide Memoire, Wash., July 16, 1913," "Controversy—United States and Japan—California Question."

29 Still less does the Washington act discriminate against the Japanese for it provides that

"'alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States."

The prohibition by this definition is made applicable to all aliens, both those eligible, and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from In re Ah Chong (2 Fed., 733).

In the latter case, Judge Sawyer held invalid a California law providing:—

"' * * * All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than $25., or by imprisonment in the county jail for a period of not less than thirty days." (at p. 734).

Of this act, the court says:—

"* * * To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish ad libitum, without price, charge, let, or hinderance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation'; and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation'; and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the

treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of
30 all privileges granted to the most favored nations.

"The fourteenth amendment of the national constitution provides that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws'. To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution." (at pp. 736 & 738).

The present case is not only to be distinguished from the Chong case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the "most favored nation" clause or any language of such import.

The Fourteenth Article of the treaty contains the general favored nation clause:—

"EXCEPT AS OTHERWISE EXPRESSLY PROVIDED in this Treaty, the High Contracting Parties agree that, IN ALL THAT CONCERNS COMMERCE AND NAVIGATION, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional." (37 Stats. at L., 1507). (the italics are those of this court).

In view of the limitation of this clause to "all that concerns commerce and navigation", it is clear that the privileges secured by Article XIV. do not apply to the limited rights granted by Article I., already quoted, in which the right to lease land is limited to that for residential and commercial purposes.

31 Neither Guinn and Beal v. United States (238 U. S., 347) nor Myers v. Anderson (238 U. S., 368) have any application to the present controversy for, if it be granted that the present law is aimed primarily at the so-called yellow, or brown races of the Orient, the result is the same. There is no restriction upon the authority of Congress to discriminate in the matter of the eligibility of an alien to become a citizen because of color. The Fifteenth Amendment provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any

State on account of race, color or previous condition of servitude. The Fourteenth Amendment made the Negroes citizens.

It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of the Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of those despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the State, were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship. (In re Ah Yup, Case No. 104, 1 Fed. Cases, p. 223). It is this disqualification put upon them by the Federal Government to which the State objects and not their color, although the Federal Government may have made their race-color the irrefutable evidence of disqualification for citizenship.

Congress in withholding the right to citizenship from these Oriental races, no doubt, recognized, as statesmen long have done,
32 that it was of the essense of its duty to insure the perpetuation of our own type of civilization. It has been well said:—

"The last two generations have seen an enormous change in the vision of life, wider and deeper than it has ever been comprehended before, and as our knowledge has grown, the narrow utilitarianism has shrivelled off us and we see the use and value and nobility of lands and ages far outside the scope of our forefathers. * * * We do not look on them as wrong in differing from ourselves. We begin to understand that they are each adapted to the country and people to which they belong and we are not so certain that we can improve everybody by trying to make them imitate us."

The sympathetic and temperate view here expressed, no doubt, should restrain us from forcing our civilization upon alien types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogen-ous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last fifty or seventy-five years now warrant a different policy; but there is no law or treaty that yet has said "the twain shall meet"; or that, if citizenship be accorded these Orientals, the danger is past of our becoming a "mechanical medley of race fragments."

It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the State may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the State might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the State but a pale shadow, and the structure erected thereon but a Tower of Babel from which the ten-

ants in possession might, when the shock of war came, bow
33 themselves out because they were not bound as citizens to defend the house in which they lodged.

This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The "free-necked-man," or "freeman" was synonymous with "free-holder." They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, Book 1, Chap. I, Subhead "The Land.") The recognition of this principle has run throughout the history of our race and its governments.

Section 33, Article II of the constitution of the State of Washington provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

In Oregon Mortgage Co. v. Carsten's (16 Wash., 165) it was held that an alien corporation which had taken a mortgage had the right to take a deed to the mortgaged land from the citizen mortgagor. As the above section excepts from its prohibition lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts," the court held that this exception did not require "a proceeding in court in the case of a mortgaged debt."

Goon Gan v. Richardson (16 Wash., 373) was also an alien mortgagee case in which the court held that the incapacity to own
34 land can only be shown at the suit of the State.

State ex rel. Winston v. Morrison (18 Wash., 664) was a suit in which the court held a ninety-nine year lease of real estate amounted to "ownership" as that word was used in the above quoted section.

In State ex rel. Winston vs. The Hudson Land Co. (19 Wash., 85) the holding was the same as to a forty-nine year lease.

In Morrell vs. Superior Court (33 Wash., 542) it was held that an alien corporation could not acquire real estate in the State of Washington by eminent domain.

Abrams vs. State of Washington (45 Wash., 327) held that the grantor in a deed of real estate to an alien could not recover the real estate; that the State, alone, could invoke rights on account of the

lisability of the grantee under the above section and that the alien having died before the State sought to escheat the lands, the heirs, although themselves aliens, were entitled to inherit the lands, as well as citizens, under the express exception in the constitution and that the State, to succeed, must proceed while the lands were still in possession of the alien wrongfully acquiring them.

In State ex rel. Atkinson vs. World Real Estate Commercial Co. (46 Wash., 104) it was held that, as the alien had conveyed the lands prior to the institution of proceedings to escheat, the State had lost such right.

Prentice vs. How (84 Wash., 136) was a decision to the same effect.

In State ex rel. Tanner vs. Staeholi (12 Wash. Dec., 288) decided September 3, 1920, the lands were escheated, although the
35 alien had, at the time of acquiring the land, believed himself a citizen and had, in good faith, exercised the rights and privileges of citizenship and had, after the proceedings of the State to escheat, filed his declaration to become a citizen.

State ex rel. Tanner v. Rychen (13 Wash. Dec., 95, decided November 1, 1920, is a decision to the same effect.

From the foregoing, it is clear that the Supreme Court of Washington has held the common law only changed by this constitutional provision to the extent plainly exercised therein. The exceptions in the constitutional provision constitute a grant to the alien and, of course, are not subject to legislative change or limitation, at least by the State. But it does not follow because the constitution prohibits alien "ownership" of lands with certain exceptions, that, the constitution not having defined what shall constitute ownership, the legislature may not do so. The legislature is not bound to leave the courts to speculate upon that subject. In fact, the act of the legislature but follows the common law:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc. upon office found, the king shall have it. (6.) But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandise or trade. (7) But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king, (8) for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch 29, of the raigne of queene Elizabeth." (Coke upon Littleton, Book 12 *b.*)

The most the act in question does is no more than to invoke a rule of strict construction against the alien as to the meaning of the word "ownership" as appearing in the constitution.

We find the other questions raised as to the validity of
36 *of* this statute to be without merit.

The preliminary injunction prayed is denied.

Concurring: Gilbert, C. J. and Neterer, D. J.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division. July 25, 1921. F. M Harshberger, Clerk, by Ed. M. Lakin, Deputy.

37 United States District Court, Western District of Washington Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Order Granting Leave to File an Amended Bill of Complaint.

On motion of the plaintiffs above named, it is ordered that leave be, and the same hereby is given plaintiffs, to file an amended Bill of Complaint herein.

Done in open Court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

38 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Amended Complaint.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, sitting in equity:

Frank Terrace and Elizabeth Terrace, his wife, citizens of the United States and of the State of Washington and residents of the Western District of Washington, and N. Nakatsuka, a subject of the Emperor of Japan, born in the Empire of Japan, of Japanese parents, and a resident of the Western District of Washington, bring their amended bill of complaint against Lindsay L. Thompson, as Attorney General of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington.

And thereunto the plaintiffs bring their amended complaint and show unto your Honors as follows:

I.

That plaintiffs suing, on behalf of themselves and others similarly situated, bring this amended bill of complaint against said Lindsay L. Thompson as the duly elected, qualified and acting Attorney General of the State of Washington.

II.

39 That the value of the matter in dispute herein between each plaintiff and the defendant exceeds the sum of $3,000.00, exclusive of interest and costs.

The jurisdiction of this Honorable Court is invoked because of and by reason of the Federal question involved in this suit and equity jurisdiction, and because plaintiffs have no adequate remedy at law.

III.

That the Plaintiffs Terrace are now and for a number of years last past have been the owners of the following described real estate lying and being in King County, State of Washington, to-wit:

The southwest quarter (S. W. ¼) of the Southeast quarter (S. E. ¼) and lot Five (5) of Section Thirty-six (36) Township Twenty-three (23) North, Range Four*t* (4) East of the Wil-amette Meridian.

That said real estate is particularly adapted to raising vegetables, and for a number of years last past has been, and is now being devoted to that and agricultural purposes. That the plaintiff N. Nakatsuka is a capable farmer and is in all respects a desirable person to become a tenant of said real estate. The *the* plaintiffs Terrace desire to lease said real estate to the plaintiff N. Nakatsuka for the period of five years, and the plaintiff N. Nakatsuka desires to accept such lease, and but for the Act of the State of Washington, hereinafter specifically mentioned, the plaintiffs would execute a lease of said real estate fron the plaintiffs Terrace to the plaintiff N. Nakatsuka for a perioa of five years from this date. N. Nakatsuka, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and shipping the same in intrastate, interstate and foreign commerce, and, instead of purchasing such farm products, he has produced and desires to continue to produce his own farm products for the purpose of selling them in the said *said* wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the treaty hereinafter mentioned.

IV.

That there was enacted by the Legislature of the State of Washington, in the year 1921, an Act entitled "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing Sections 135 and 136 of Pierce's Code 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 8, 1921.

V.

That the defendant Lindsay L. Thompson, as the Attorney General of the State of Washington, has threatened to, and will enforce said Act in each and all of its terms, and the whole thereof, and particularly against these plaintiffs in the event that they enter into a lease of said real estate for the purpose and terms aforesaid will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute these plaintiffs criminally for an alleged violation of said Act, above mentioned, and the said Act is of its terms so drastic, and the penalties attached to a violation of the terms thereof are so great, that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said Act *for* the Legislature above mentioned, and unless this Court shall determine the validity of said Act in this proceeding, said plaintiffs will be compelled to submi

to said Act whether the same be valid or invalid, and thereby be deprived of their property without due process of law and
41 denied the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

VI.

That said Act of the Legislature of the State of Washington above mentioned, is in violation of and contrary to Section 33 of Article II of the Constitution of the State of Washington; and protection of the provisions of said Section are hereby expressly invoked by the plaintiffs and each of them.

VII.

That said Act of the Legislature of the State of Washington, above mentioned, is in violation of and contrary to the existing Treaty between the United States of America and the Empire of Japan, and particularly Article I thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident to or necessary for trade upon the same terms as native citizens of the United States of America; and the protection of said Treaty and of Article I thereof is especially invoked by these plaintiffs and each of them.

VIII.

That said Act of the Legislature of the State of Washington is in contravention of Section 3 of Article I of the Constitution of the State of Washington in that it deprives these plaintiffs of property without due process of law; is in contravention of Section 12 of Article I of the Constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not equally belong to all citizens; and protection of the provisions of said Sections of Article I of the Constitution of the State of Washington is hereby specially invoked by the plaintiffs and each of them.

42 IX.

The said Act of the Legislature of the State of Washington above mentioned, is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law; and protection of said Section 1 of the Fourteenth Amendment to the Constitution of the United States is hereby specially invoked by the plaintiffs and each of them.

X.

That if the plaintiffs are not permitted to enter into a lease of said real estate, as aforesaid, and on the terms above mentioned, a large and irreparable loss will occur to them and each of them, and the plaintiffs have no adequate remedy at law but are relievable only in a court of equity.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

1. That Lindsey L. Thompson, as Attorney General of the State of Washington be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this Court from bringing, directly or indirectly, and from permitting to be brought directly, or indirectly, any proceedings at law or in equity for the purpose of enforcing said Act of the Legislature of the State of Washington, above mentioned, against these plaintiffs, or either of them, upon their executing or attempting to execute a lease
43 of real estate above mentioned for the above mentioned term or any other person, or corporation similarly situated and from causing the plaintiffs, or either of them, or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the complainants or either of them, from executing and delivering such lease on said real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendant requiring him to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the hearing the aforesaid Act passed by the Legislature of the State of Washington be declared to be unconstitutional illegal and void and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpœna may issue to defendant requiring him to answer this amended bill of complaint fully and truthfully, but not on oath, an oath hereby being waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

JAMES B. HOWE.
E. H. GUIE.
DALLAS V. HALVERSTADT.

44 THE UNITED STATES OF AMERICA,
Western District of Washington,
Southern Division, ss:

Frank Terrace and N. Nakatsuka, each being first duly sworn, on oath deposes and says for himself: I am one of the plaintiffs named in the foregoing amended bill of complaint; I have read the foregoing amended bill of complaint, know the contents thereof, and the same is true to my own knowledge; that I make this verification in behalf of my co-plaintiff as well as in my own behalf.

FRANK TERRACE.
N. NAKATSUKA.

Subscribed and sworn to before me this 3rd day of November, 1921.

[Notarial Seal.] E. H. GUIE,
Notary Public in and for the State of Washington, Residing at Seattle.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 18, 1921. F. M. Harshberger, Clerk, by Ed M. Lakin, Deputy.

45 In the United States District Court for the Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

—

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Motion to Dismiss.

Comes now the defendant, Lindsay L. Thompson, as Attorney General of the State of Washington, and moves the court to dismiss the amended bill of Complaint filed herein for the reasons and upon the ground that, as appears upon the face thereof;

1. Said bill of complaint does not state any matters of equity entitling the plaintiffs, or any of them, to the relief prayed for.

2. Said bill of complaint does not state facts sufficient to entitle plaintiffs, or any of them, to any relief against this defendant;

3. The plaintiffs, and each of them, have a plain, adequate, complete and speedy remedy at law.

Wherefore defendant prays the judgment of this court whether he shall further answer and that he be dismissed with his costs.

L. L. THOMPSON,
Attorney General,
Solicitor for Defendant.

Copy of within motion to dismiss received and service acknowledged this — day of November, 1921.

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Plaintiffs.

46 Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 18, 1921. F. M. Harshberger, Clerk, by Ed M. Lakin, Deputy.

47 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Order Denying Injunction Pendente Lite.

This cause came on regularly to be heard before the Honorable W. B. Gilbert, United States Circuit Judge, Honorable Edward E. Cushman and Honorable Jeremiah Neterer, United States District Judges at the City of Tacoma, Washington, upon the application of the complainants for a temporary injunction herein, the plaintiffs appearing and being represented by their solicitors, Messrs. James B. Howe, E. H. Guie and Dallas V. Halverstadt, the Defendant being represented by Lindsay L. Thompson, as Attorney General of the State of Washington, and the Court having heard the arguments of counsel and being fully advised in the premises,

It is ordered that the application of the plaintiffs for a temporary injunction herein, be, and the same hereby is, denied.

Done in open Court this 13th day of December, 1921.

EDWARD E. CUSHMAN.

O. K. as to form.
L. L. THOMPSON,
Solicitor for Defendant.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, By Ed M. Lakin, Deputy.

48 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiff-,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Judgment of Dismissal.

This cause came on for hearing before the court on the 13th day of December, 1921, upon the motion of the defendant above named to dismiss the amended bill of complaint herein, the plaintiffs appearing by their solicitors, Messrs. James B. Howe, E. H. Guie and Dallas V. Halverstadt, the defendant appearing by Lindsay L. Thompson, as Attorney General of the State of Washington, and after argument, and the court being fully advised in the premises,

It is ordered that the motion of the defendant to dismiss said action, be and the same hereby is granted, and that defendant do have and recover his costs and disbursements herein to be taxed to which the plaintiffs and each of them except and their exceptions are hereby allowed.

Done in open court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, By Ed M. Lakin, Deputy.

O. K. as to form.

L. L. THOMPSON,
Solicitor for Defendant.

49 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Wash ington, Defendant.

Petition for Allowance of Appeal.

The above named Frank Terrace and Elizabeth Terrace, his wif and N. Nakatsuka, appellants, conceiving themselves aggrieved b the judgment and order of the United States District Court, in th above entitled cause, rendered on the 13th day of December, 192 denying the motion of complainants for a temporary injunction i said cause, and granting the motion of the appellee to dismiss sai cause, do hereby appeal from said judgment and order to the S preme Court of the United States and pray that this, their appe may be allowed, and that a transcript of the record and proceedin in said cause, and all things concerning the same upon which sa order and judgment were made, duly authenticated, may be sent the Supreme Court of the United States in order that the errors co plained of in the assign*emtn* of erro-s herein filed by said appellan may be reviewed, and if error be found, corrected according to t laws and customs of the United States.

JAMES B. HOWE.
E. H. GUIE.
DALLAS V. HALVERSTADT.

Indorsed: Filed in the United States District Court, Weste District of Washington, Southern Division, Dec. 14, 1921. F. Harshberger, Clerk, By Ed M. Lakin, Deputy.

50 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiff-,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Assignment of Error-.

Come now the appellants in the above entitled cause and aver and show that in the records and proceedings in said cause the United States District Court for the Western District of Washington, Southern Division, erred to the grievious injury and wrong of the appellants in said cause and to the prejudice, and against the right of the appellants herein in the following particulars, to-wit:

I.

In denying a temporary injunction in said cause.

II.

In denying a permanent injunction in said cause.

III.

In granting the motion of the defendant to dismiss said action.

IV.

In enterning judgm-nt dismissing said action.

V.

In holding that Cnapter 50, of the Session Laws of the State of Washington for the year 1921, being an Act entitled: "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington," does not deprive the appellants of their property
51 without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI.

In holding that said Chapter 50 of the Laws of the State of Washington for the year 1921 does not deny the appellants the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VII.

In holding that said Chapter 50 of the Laws of the State of Washington for the year 1921 does not deprive the appellants of their property without due process of law, contrary to Section 3 of Article 1 of the Constitution of the State of Washington.

VIII.

In holding that said Chapter 50 of the Session Laws of the State of Washington for the year 1921 does not grant citizens privileges or immunities which upon the same terms do not fully apply to all citizens of the State of Washington, contrary to Section 12 of Article I of the Constitution of the State of Washington.

IX.

In holding that said Chapter 50 of the Session Laws of the State of Washington for the year 1921 is not in violation of and contrary to Section 33 of Article II of the Constitution of the State of Washington.

X.

In holding that said Chapter 50 of the Session Laws of the State of Washington for the year 1921 is not in violation of and contrary to the existing Treaty between the United States of America and the Empire of Japan, and particularly Article I thereof.

Wherefore, for these and other manifest errors appearing
52 in the record, the appellants pray that the judgment of the United States District Court for the Western District of Washington, Southern Division, be reversed and set aside and held for naught, and that judgment be rendered for the appellants herein granting to them their rights under the Constitution of the United States and the Constitution of the State of Washington and the Treaty existing between the United States of American and the Empire of Japan.

JAMES B. HOWE.
E. H. GUIE.
DALLAS V. HALVERSTADT.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

53 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Order Allowing Appeal.

It is hereby ordered that the appeal prayed for by the above named appellants in the above entitled cause to the Supreme Court of the United States be, and the same hereby is, allowed as prayed.

Done in open Court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

54 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRANCE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the States of Washington, Defendant.

Order Fixing Amount of Bond on Appeal.

On reading the petition of the above named appellants in the above entitled cause for the allowance of an appeal to the Supreme Court of the United States from the judgment and order of the District Court of the United States for the Western District of Washington, Southern Division, rendered herein,

It is ordered that the appellants above named execute and file in the office of the Clerk of the above entitled Court a bond on appeal, conditioned according to law, in the sum of $500.00, with good and sufficient surety to be approved by the undersigned.

Done in open Court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 14, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

55 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Appeal Bond.

Know all men by these presents: That we, Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, appellants above named, as principals, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a surety in the State of Washington, as surety, are held and firmly bound unto Lindsay L. Thompson, as Attorney General of the State of Washington, in the full and just sum of $500.00, for the payment of which well and truly to be made, we hereby bind our and each of our heirs, executors, and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 13th day of December, 1921.

The condition of the foregoing obligation is such that,

Whereas, the appellants above named have duly appealed from the final judgment and order herein to the Supreme Court of the United States; and

Whereas, the above entitled Court fixed the amount of bond to be given by said appellants upon said appeal in the sum named as the penalty of this bond; and

Now, therefore, if the appellants shall prosecute their appeal to effect and if they fail to make their plea good shall answer
56 all costs, this obligation shall be null and void; otherwise to remain in full force and effect.

FRANK TERRACE,
ELIZABETH TERRACE,
N. NAKATSUKA,
By JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Their Attorneys.

[Corporation Seal.] NATIONAL SURETY COMPANY,
By GEO. W. ALLEN,
Resident Vice President.

Attest:
ROLLO V. WHYTE,
Resident Assistant Secretary.

The above and foregoing bond and the surety th-reon is approved this 13th day of December, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Dec. 14, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

57 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Citation.

UNITED STATES OF AMERICA:

The President of the United States to Lindsay L. Thompson, as Attorney General of the State of Washington, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, within sixty (60) days after the date of

this citation, pursuant to an appeal allowed and filed in the office of the Clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, are appellants and you are the appellee, to show cause, if any there be, why the judgment and order rendered against the said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, and the seal of said United States District Court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, Southern Division.

58 Indorsed: Filed in the United States District Court, Western District of Washington, Southern *Washington,* Dec. 14,
1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

59 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Acceptance of Service.

Due, regular and timely service of the Citation on appeal in the above entitled cause from the United States District Court for the Western District of Washington, Southern Division, to the Supreme Court of the United States, of the præcipe for record on appeal in said cause, of the petition for allowance of appeal, of the assignment of errors, of the order fixing amount of Bond on appeal, and of the appeal bond in said cause, is hereby admitted this 15th day of December, 1921.

L. L. THOMPSON,
Solicitor for Appellee.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 16, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

60 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Præcipe for Record on Appeal.

To the Clerk of the above entitled Court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to-wit:

Bill of Complaint.
Motion for termporary injunction.
Order fixing date for hearing of motion for temporary injunction.
Notice of hearing of motion for temporary injunction.
Affidavit of defendant in opposition to motion for *for* temporary injunction.
Motions to dismiss of defendant to dismiss bill of complaint.
Opinion of Court on application for temporary injunction.
Amend bill of Complaint.
Order granting leave to file amended bill of complaint.
Motion to dismiss amended bill of complaint.
Order denying injunction pendente lite.
Judgment of dismissal.
Petition for allowance of appeal.
Assignment of errors.
Order allowing appeal.
Order fixing amount of bond on appeal.
Bond on appeal.
Citation.
Acceptance of service.
This præcipe, with acceptance of service thereof.

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

Service hereof and receipt of copy is acknowledged this
61 22 day of December, 1921.

L. L. THOMPSON,
Solicitor for Appellee.

Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 24, 1921. F. M. Harshberger, Clerk, by Ed. M. Lakin, Deputy.

62 *Certificate of Clerk of United States District Court of Transcript of Record.*

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing and attached is a full, true and correct transcript of the record and proceedings in the case of Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, Plaintiffs, versus Lindsay L. Thompson, as Attorney General of the State of Washington, Defendant Cause No. 132-Equity in said District Court, as required by præcipe of counsel filed and shown herein and as the originals thereof appear on file and of record in my office in said District at Tacoma.

I further certify that I attach hereto the original Citation on Appeal with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellants for making the record, certificate and return to the Supreme Court of the United States in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record and return 139 folios @ 15¢ each	$20.85
Certificate of Clerk to Transcript, 2 folios at 15¢ each and seal	.50
	$21.35

Attest my hand and the seal of said District Court at Tacoma, in said District, this 12th day of January, A. D. 1922.

F. M. HARSHBERGER,
Clerk,

By ALICE HUGGINS,
Deputy Clerk.

63 United States District Court, Western District of Washington, Southern Division.

In Equity.

No. 132.

FRANK TERRACE and ELIZABETH TERRACE, His Wife, and N. NAKATSUKA, Plaintiffs,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington, Defendant.

Citation.

UNITED STATES OF AMERICA:

The President of the United States to Lindsay L. Thompson, as Attorney General of the State of Washington, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, within sixty (60) days after the date of this citation, pursuant to an appeal allowed and filed in the office of the Clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, are appellants and you are the appellee, to show cause, if any there be, why the judgment and order rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, and the seal of said United States District Court this 13th day of December, 1921.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, Southern Division.

Endorsed on cover: File No. 28,761. W. Washington D. C. U. S. Term No. 302. Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, appellants, vs. Lindsay L. Thompson, attorney general of the State of Washington. Filed March 11th, 1922. File No. 28,761.

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

MOTION TO POSTPONE ARGUMENT

L. L. THOMPSON,
Solicitor for Appellee.

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

PROOF OF MAILING MOTION

State of Washington, } ss.
County of Thurston. }

The undersigned, being first duly sworn, deposes and says: That on December , 1922, at Olympia, Washington, I deposited in the United States Postoffice, in a sealed envelope addressed to Dallas V. Halverstadt, 306 Marion Building, Seattle, Washington, solicitor for appellants herein, a true copy of the motion to postpone argument and notice, postage fully prepaid thereon.

Subscribed and sworn to before me this..... day of December, 1922.

Notary Public in and for the State of Washington, residing at Olympia.

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE AND ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

MOTION TO POSTPONE ARGUMENT

The appellee, Lindsay L. Thompson, as attorney general of the State of Washington, moves that this case be not heard by this court prior to March 20, 1923, and, if possible, that it be not heard before April 20, 1923, for the following reasons, to-wit:

1. This case is an appeal from a final decree of the United States District Court for the Western District of Washington, in which decree the court

dismissed the bill of complaint in which was sought an injunction restraining the appellee, the attorney general of the State of Washington, from enforcing or attempting to enforce the provisions of an act passed by the legislature of said state, commonly known as the alien land act.

2. There is also pending an appeal to this court three certain actions entitled *Porterfield et al. v. Webb et al.*, No. 299; *Webb et al. v. O'Brien et al.*, No. 267, and *Frick et al. v. Webb et al.*, No. 555, October Term, 1922. These actions were, in the spring of 1922 heretofore advanced for hearing before this court to a day certain, to-wit: to November 13, 1922, which date was subsequently changed to November 27, 1922. These cases involve the construction and validity of a certain statute of California known as the California alien land law, which act is in many respects similar to the Washington act involved in the present action, and there are therefore involved for determination in the four cases a number of similar questions.

3. Upon September 20, 1922, appellants herein moved that this case be advanced for hearing so that it might be heard upon the same day as is heard the case of *Porterfield v. Webb*, No. 299, heretofore referred to, which motion was thereafter granted by this court. Appellee herein consented to the granting of said motion, and the advancement of this cause for hearing upon the understanding that the case of *Porterfield v. Webb* would come on for hearing be-

fore this court in the month of November, 1922, and had he known that said case might be argued at some date subsequent to January 8, 1923, and prior to March 20, 1922, he would not have consented to said advancement. Thereafter, and shortly prior to November 27, 1922, this court vacated its order setting said cases for argument upon November 27, 1922, and ordered that said cases be heard before the full court upon a date to be thereafter determined.

4. Appellee is represented herein by L. L. Thompson, attorney general of the state of Washington, who has personally handled this case since its inception, both in the District Court and in this court, and he has no other counsel who are familiar with the issues or matters herein involved. The legislature of the state of Washington will convene upon January 8, 1923, and will continue in continuous session thereafter until March 8, 1923. Under the constitution and laws of the state of Washington the said L. L. Thompson is the legal adviser of the members of said legislature. Many of the matters which will arise at the session of said legislature are of such a nature as to require the personal attention and consideration of the attorney general, and it will therefore be very difficult, if not impossible, for him to leave the state of Washington between said dates. If the case, therefore, is called for argument during that time, appellee will probably not be represented by counsel at the oral argument, to his prejudice and

to the prejudice of the people of the state of Washington, who are the real parties in interest herein.

5. Appellee has been advised by the Hon. U. S. Webb, attorney general of the state of California, who appears in behalf of the state of California in the cases referred to in paragraph 2 hereof, that if this case is set for argument at some date late in April, he will move that the California cases be heard upon the same date, but that he does not desire to have said cases heard during the month of March or early in April on account of the fact that the legislature of California will be in session during that time. In consequence whereof, appellee has suggested that if it is feasible, the cases be heard during the latter part of April to the end that all of said cases may be heard at the same time and all of the parties involved may have an adequate opportunity to be heard.

Appellee therefore respectfully urges that this motion be granted.

L. L. THOMPSON,
Attorney General,
Solicitor for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE AND ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

PLEASE TAKE NOTICE that on Monday, January 8, 1923, at 12:00 o'clock noon, or as soon thereafter as counsel may be heard, L. L. Thompson, as attorney general of the state of Washington, the appellee in the above entitled cause, will submit to the Supreme Court of the United States a motion, a copy of which is attached hereto, petitioning said court to postpone the argument of the above entitled cause.

Dated December 30, 1922.

L. L. THOMPSON,
Solicitor for Appellee.

To: JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellee,
Seattle, Washington.

No. 302.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Motion to Advance

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

No. 302.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Motion to Advance

The appellants, Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, move that this case be advanced for hearing upon the same day as is heard the case of *Porterfield vs. Webb,* No.

299, October Term, 1922, for the following reasons, to-wit:

1. This case is an appeal from a final decree of the United States District Court for the Western District of Washington, in which decree the court dismissed the bill of complaint in which was sought an injunction restraining the appellee, the Attorney General of the State of Washington, from enforcing or attempting to enforce the provisions of an act passed by the legislature of the State of Washington in the year 1921, commonly known as the Alien Land Act, which act is claimed by appellants to be in violation of the Constitution of the United States and a certain treaty entered into between the United States and the Empire of Japan.

2. There is pending on appeal in this court that certain action entitled *"Porterfield, et al. vs. Webb, as Attorney General of California, et al.,"* No. 299, October term, 1922, which is set for argument in this court on November 13, 1922, which appeal involves the question of the constitutionality of an act adopted at the election in November, 1920, known as the California Alien Land Law, which act is in many respects similar to the Washington act involved in the present action, and there is, therefore, involved for determination in the two

cases a number of identical questions.

3. The case is of considerable importance inasmuch as it involves a determination of the question of the power of the legislature of the State of Washington to prohibit the ownership of land and every interest therein, and the right to lease, control, possession and use of lands by persons who are not citizens or who have not declared their intention to become citizens, and affects the property rights of numerous aliens and classes of aliens and citizen land owners in the State of Washington.

4. If the case is submitted to this court upon the same day as is the case of *Porterfield vs. Webb,* before referred to, it will obviate the necessity for an independent consideration at separate times of a number of points of considerable difficulty which are involved in both cases, and will, we believe, for that reason materially lessen the labors of this court in connection therewith.

Appellants therefore respectfully urge that this motion be granted.

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

No. 302.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

PLEASE TAKE NOTICE that on Monday, October 2, 1922, at 12:00 o'clock noon, or as soon thereafter as counsel may be heard, Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, the appellants in the above entitled cause, will submit to the Supreme Court of the United States a motion, a copy of which is attached hereto, petitioning said Court to advance the above entitled cause for hearing.

Dated September 20, 1922.

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

To:
Hon. L. L. Thompson,
Attorney General of the State of Washington,
Solicitor for Appellee, Olympia, Washington.

No. 302.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

Consent is hereby given to the advancement of this case for hearing so that said case may be heard by this Court upon the same day as is heard the case of *Porterfield, et. al. vs. Webb, Attorney General, et al.,* No. 299, October term, 1922.

Dated September 20, 1922.

L. L. THOMPSON,
Attorney General of the State of Washington,
Solicitor for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Appellants' Brief

JAMES B. HOWE,
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Solicitors for Appellants.

INDEX

PAGE

Act, Alien Land 4
Constitutional Provision 9
Errors relied upon 15
The Jurisdiction 15
Buchanan vs. Warley, 245 U. S. 60 17
Ex Parte Young, 209 U. S. 123 17
Raich vs. Truax, 219 Fed. 273 17
Truax vs. Raich, 239 U. S. 33 17
The state constitutional provision is exclusive of all disabilities of aliens respecting land and the legislature had no power to add thereto 19
Abrams vs. State, 45 Wash. 327 ..... 28, 38
Bronson vs. Syverson, 88 Wash. 264 43
Goon Gan vs. Richardson, 16 Wash. 373 24
Governeur vs. Robertson, 11 Wheat. 332 38
Hauenstein vs. Leynham, 100 U. S. 483 38
Morrell vs. Superior Court, 35 Wash. 542 28
Nunnemacher vs. State, 129 Wis. 190 39
Oregon Mortgage Co. vs. Carstens, 16 Wash. 165 ..... 19, 38
Prentice vs. How, 84 Wash. 156 35
Roger vs. Whitham, 56 Wash. 190 35
R. C. L. Vol. 6, Sec. 52 44
Sedgewick on Constitutional Law 44
State ex rel Atkinson vs. Evans, 46 Wash. 219 43
State ex rel Atkinson vs. World Real Estate Commerce Co., 46 Wash. 104 33
State ex rel Barker vs. Assurance Co., 251 Mo. 278 39
State ex rel Ellis vs. Cuyahoga County, 70 O. S. 341 39
State ex rel Tanner vs. Rychen, 113 Wash. 90 36
State ex rel Tanner vs. Staeheli, 112 Wash. 344 35
State ex rel Winston vs. Hudson Land Co., 19 Wash. 35 ..... 25, 38
State ex rel Winston vs. Morrison, 18 Wash. 664 24
United States vs. Arrendono, 6 Peters, 691 46
White vs. Burley, 12 Kan. 235 38
The act takes the property of the parties without due process of law, in that it prohibits Nakatsuka from following a common occupation of the community, and makes it a criminal offense for the Terraces to avail themselves of Nakatsuka's services in any capacity other than a mere wage earner, and prohibits them from making a lawful use of their property 50
Adama vs. Tanner, 244 U. S. 590 52
Allgeyer vs. Louisiana, 165 U. S. 578 51
Barber vs. Connolly, 113 U. S. 27 51
Buchanan vs. Warley, 245 U. S. 60 ..... 60, 61
Butchers' Union Slaughter House and Landing Co. vs. Crescent City Live Stock Landing and Slaughter House Co., 111 U. S. 754 50

PAGE

Coppage vs. Kansas, 236 U. S. 1 51
Mountain Timber Co. vs. State, 243 U. S. 219 59
New York Central Railroad Co. vs. White, 243 U. S. 188 58
O'Brien vs. Webb, 279 Fed. 117 56
Powell vs. Pennsylvania, 127 U. S. 678 51
Tibbals vs. Iffland, 10 Wash. 451 54
Tieton Hotel Co. vs. Manheim, 75 Wash. 641 56
Truax vs. Raich, 239 U. S. 33 ..... 51, 60
Yick Wo vs. Hopkins, 118 U. S. 356 51

The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end 62

Ah Fong, re, 3 Sawy. 144 72
Ah Kow vs. Nunan, 5 Sawy. 552 71
American Sugar Refining Co. vs. Louisiana, 179 U. S. 89 67
Atchison, T. & S. Fe Ry. Co. vs. Vosberg, 238 U. S. 56 ..... 100, 110
Atkin vs. Kansas, 191 U. S. 207 64
Ah Chong, 6 Saw. 45, 2 Fed. 733 83
Adair vs. United States, 208 U. S. 161 105
Blythe vs. Blythe, 180 U. S. 333 64
Buchanan vs. Warley, 245 U. S. 60 ..... 62, 68
Chirac vs. Chirac, 2 Wheat. 259 64
Clarke vs. Clarke, 178 U. S. 186 64
Commonwealth vs. Cosick, 36 Pa. Co. R. 637 85
Commonwealth vs. Hanna, 195 Mass. 262 85
Commonwealth vs. Titcomb, 229 Mass. 14 77
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540 107
Coppage vs. Kansas, 236 U. S. 1 105
Cotting vs. Kansas City Stock Yards, 183 U. S. 79 108
County of San Mateo vs. Southern Pacific Ry. Co., 15 Fed 722 85
DeVaughn vs. Hutchinson, 165 U. S. 566 64
Fong Yue King vs. United States, 149 U. S. 698 66
Geer vs. Connecticut, 161 U. S. 519 83
Geronimo Para, re, 269 Fed. 643 79
Gulf, Colorado & St. Fe Ry. Co. vs. Ellis, 165 U. S. 150 ..... 108, 112
Harper vs. Galloway, 59 Fla. 255 ..... 85, 86
Hauenstein vs. Leynham, 199 U. S. 488 64
Heim vs. McCall, 239 U. S. 173 64
McCready vs. Virginia, 94 U. S. 395 ..... 64, 83
McFarland vs. American Sugar Refining Co., 241 U. S. 79 109
Manchester vs. Massachusetts, 139 U. S. 240 83
Opinion of Justices, re, 207 Mass. 601 73
Patsone vs. Pennsylvania, 232 U. S. 138 ..... 64, 83
Poon vs. Miller, 234 S. W. 573 87
Porterfield vs. Webb, 279 Fed. 114 94
Qwong Wing vs. Kirkendall, 223 U. S. 59 89
Raich vs. Truax, 219 Fed. 273 85

PAGE

Revised Statutes, Sec. 2169 79
R. C. L. Vol. 1, p. 823 82
Satio, In re, 62 Fed. 126 79
Silz, ex rel, vs. Hesterberg, 211 U. S. 31 83
Smith vs. Texas, 233 U. S. 630 101
Southern Ry. Co. vs. Green, 216 U. S. 400 100
State vs. Julow, 129 Mo. 163 105
State vs. Montgomery, 94 Me. 192 73
State vs. Savage, 96 Ore. 53 86
State ex rel Constantine vs. Darwin, 102 Wash. 402 115
State ex rel Winston vs. Morrison, 18 Wash. 644 82
Takai Maru, re, 190 Fed. 45 85
Tanner vs. Little, 240 U. S. 369 112
Templar vs. Board, 131 Mich. 254 73
Tetsubumi Yano, Estate of (not officially reported) 90
Tiburcio Parrott, re, 1 Fed. 481 68
Tragesser vs. Gray, 73 Md. 251 85
Truax vs. Carrigan (not officially reported) 111
Truax vs. Raich, 239 U. S. 33 ..... 68, 111
United States vs. Balsara, 180 Fed. 694 85
United States vs. Wing Kim Ark, 169 U. S. 649 ..... 67, 81
Virginia, Ex parte, 100 U. S. 339 65
Welch vs. Swasey, 214 U. S. 191 100
Wong Wing vs. United States, 163 U. S. 228 66
Yick Wo vs. Hopkins, 118 U. S. 336 ..... 64, 65, 88
Young, In re, 189 Fed. 175 79

As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions, by reason of the language in subdivision (a), Section 1, the entire act is invalid 116
Baldwin vs. Franks, 120 U. S. 678 117
Butts vs. Merchants & Miners Transportation Co., 230 U. S. 126 117
Illinois Central Ry. Co. vs. McKendree, 203 U. S. 514 117
James vs. Bowman, 190 U. S. 127 117
McFarland vs. American Sugar Refining Co., 241 U. S. 79 117
The Trademark cases, 100 U. S. 82 111
United States vs. Harris, 106 U. S. 629 116
United States vs. Ju Toy, 198 U. S. 253 117
United States vs. Reese, 92 U. S. 214 116

The impossibility of compliance with the act under consideration, by a Japanese, frees him from the obligation to comply 117
Ah Chong, In re, 2 Fed. 733 118
Bishop on Contracts, Sec. 595 118
Bishop's Non-Contract Law, Sec. 156 118
Endlich on Interpretation of Statutes, Sec. 441 118
R. C. L., Vol. 8, p. 1107, Sec. 167 117
R. C. L., Vol. 28, p. 320, Sec. 308 117
Tiburcio Parrott, In re, 1 Fed. 481 118

PAGE

The act is contrary to Article I of the existing Treaty between the United States and the Empire of Japan, in that it prohibits Japanese subjects, resident in the State of Washington, from carrying on therein trade, wholesale and retail, from leasing land for commercial purposes and from doing the things necessary for or incident to trade upon the same terms as native citizens or subjects 119

Adams vs. Akerlund, 168 Ill. 632 133
Bouvier's Law Dictionary, 635 133
Buchanan vs. Warley, 245 U. S. 60 134
Chew Hoeng vs. United States, 112 U. S. 536 132
Colby vs. Dean, 70 N. H. 591 138
Finnegan vs. Knights of Labor Bldg. Association, 52 Minn. 239 139
Geoffrey vs. Riggs, 133 U. S. 258 ..... 130, 132
Hauenstein vs. Leynham, 100 U. S. 473 132
International Law Digest, Moore, Vol. 4, Sec. 552 124
International Law Digest, Moore, Vol. 4, p. 113 124
International Law Digest, Moore, Vol. 4, Sec. 555 125
International Law Digest, Moore, Vol. 6, p. 702 126
Jackson vs. Town of Union, 82 Conn. 266 138
May vs. Rice, 101 U. S. 231 138
Schooner Nymph, 1 Sumn. 517 137
Shanks vs. Dupont, 3 Peters 242 132
Smith vs. Cooley, 65 Cal. 46 139
State vs. North, 160 N. C. 1010 139
Stixrud's Estate, In re, 58 Wash. 353 132
Sullivan vs. Kidd, 254 U. S. 433 132
Tucker vs. Alexandroff, 183 U. S. 424 ..... 129, 132
United States vs. Reynes, 9 How. 126 132
United States vs. Texas, 162 U. S. 1 132
University vs. Miller, 3 Dev. 188 133
Vattel's Law of Nations, p. 284 130

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Appellants' Brief

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Western District of Washington, Southern Division, granting appellants' motion to dismiss, and dismissing, the amended bill of complaint, in an action to restrain

the enforcement of the Alien Land Act. The action involves the constitutionality of that Act.

THE STATUTE AND CONSTITUTIONAL PROVISION.

"AN ACT relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

"*Section 1.* In this act, unless the context otherwise requires,

"(a) 'Alien' does not include an alien who had in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

"(b) 'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is ac-

corded the use of land by a treaty between the United States and the country whereof he is a citizen;

"(c) 'Land' also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

"(d) To 'own' means to have the legal or equitable title to or the right to any benefit of;

"(e) 'Title' includes every kind of legal or equitable title;

"(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

"(g) 'Inheritance' includes devise;

"(h) 'Mortgage' includes every kind of lien on land;

"(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

"(j) 'Person' includes an individual, partnership, corporation, or any other organized group of persons.

"*Section 2.* An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation

of the constitution or of this act shall thereby be forfeited to and become the property of the state.

"*Section 3.* An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land. *Provided,* an alien now lawfully acting in any such capacity may continue for not more than two years.

"*Section 4.* If hereafter an alien acquires land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, held the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

"*Section 5.* If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

"*Section 6.* Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

"*Section 7.* Whoever

"(a) Knowingly transfers or conveys land

or title to land to an alien; or

"(b) Knowingly takes land or title to land in trust for an alien; or

"(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

"(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

"(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

"(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

"(g) Wilfully counsels, aids or abets another in violating or evading this act,

"Is guilty of a gross misdemeanor.

"*Section 8.* It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

"*Section 9.* Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

"*Section 10.* This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

"*Section 11.* If any section or provision of this act shall be adjudged to be invalid or unconstitutional such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

"*Section 12.* Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

"Passed the House February 25, 1921.

"Passed the Senate March 2, 1921.

"Approved by the Governor March 8, 1921."

(Chapter 50, Laws of Washington, 1920-1921.)

Sections 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington, mentioned in Section 12 of the Act, are as follows:

> "*Section 8775.* Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in like manner and with like effect as if such alien were a citizen of this state or of the United States."
>
> "*Section 8776.* Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, whether a resident of this state or not, shall be and is hereby permitted to construct, build, equip, lease, use, sell, hold, and dispose of, or acquire by purchase or otherwise, any railroad, tramway, or bridge in this state, and shall be and is hereby allowed to work and operate the same, to acquire and hold lands in connection therewith, to mortgage the same, or said railroad, tramway or bridge, and to transact the business, collect and receive tolls, hold, use and dispose of the franchise and rights of any such railroad, tramway, or bridge, with the same powers and privileges in all respects as now or may hereafter belong to citizens of this state."

Section 33 of Article II of the Constitution of the State of Washington is as follows:

"*Section 33.* The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void; Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

THE FACTS.

The plaintiffs, suing on behalf of themselves and all others similarly situated, filed their bill of complaint in which they alleged:

That the plaintiffs Terrace are citizens of the United States and of the State of Washington and residents of the Western District of Washington, and plaintiff Nakatsuka is a subject of the Emperor or Japan (and in the amended bill of complaint it is further alleged that he was born in the Empire of Japan, of Japanese parents), and a resident of the Western District of Washington, bring their

bill of complaint against the defendant, as Attorney General of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington; that the value of the matter in dispute in the action between the plaintiffs and the defendant exceeds the sum of $3,000.00, exclusive of interest and costs; that the jurisdiction of the court is invoked because of the Federal question involved in the action and equity jurisdiction and because plaintiffs have no adequate remedy at law; that the plaintiffs Terrace are, and for a number of years have been, the owners of a designated tract of real estate in King County, State of Washington, which is particularly adapted to raising vegetables, and for a number of years last past has been and now is being devoted to that and to agricultural purposes; that the plaintiff Nakatsuka is a capable farmer and is in all respects a desirable person to become a tenant of said real estate; that the plaintiffs Terrace desire to lease said real estate to Nakatsuka for period of five years, and Nakatsuka desires to accept such lease, and, but for the Act, the plaintiffs would execute a lease of said real estate from the plaintiffs Terrace to the plaintiff Nakatsuka for a period of five years from the date of the bill of complaint; that Nakatsuka, in addi-

tion to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products (in the amended complaint is added "and shipping the same in intrastate, interstate and foreign commerce"), and, instead of purchasing said farm products, he had produced and desires to continue to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the existing treaty between the United States of America and the Empire of Japan; that the defendant, as Attorney General, has threatened to enforce, and will enforce, each and all of the terms of the Act and in the event plaintiffs enter into a lease of said real estate for the purpose and term aforesaid, will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute the plaintiffs criminally for an alleged violation of the Act; that the Act is in its terms so drastic, and the penalties for a violation of its terms are so great, that neither of the plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said Act, and unless the court shall determine its validity in

this proceeding, the plaintiffs will be compelled to submit to the Act whether the same be valid or invalid. The plaintiffs charge that said Act is in contravention of Section 33 of Article II of the Constitution of the State of Washington, and especially invoke the protection thereof; that said Act is in violation of and contrary to the existing Treaty between the United States of America and the Empire of Japan, and particularly Article I thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident thereto or necessary for trade upon the same terms as native citizens of the United States, and especially invoke the protection of said Treaty and Article I thereof; that said Act is in contravention of Section 3 of Article I of the Constitution of the State of Washington in that it deprives the plaintiffs of property without due process of law, and of Section 12 of Article I of the Constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not equally belong to all citizens, and especially invoke the protection of the said provisions; that said Act is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the Unied States in that it deprives the plaintiffs of property without

due process of law and denies to them and each of them the equal protection of the law, and especially invoke the protection of said Amendment.

They further allege that if they are not permitted to enter into such lease of said real estate, a large and irreparable loss will occur to them and each of them, and that they have no adequate remedy at law but are relievable only in a court of equity (R. 1-5).

At the time of filing the bill, the plaintiffs served and filed a motion for a temporary injunction, restraining the defendant, *pendente lite,* from enforcing or attempting to enforce the Act. At the time that motion came on for hearing, the defendant filed its motion to dismiss (which was later amended by consent) upon the ground of lack of equity, insufficient facts and that the plaintiffs and each of them have a plain, adequate, complete and speedy remedy at law (R. 10, 11). The court denied the motion for a temporary injunction, holding the Act valid (R. 30). The opinion appears on pages 12-24 of the record.

Thereafter, on leave, an amended bill of complaint was filed, containing the two amendments heretofore mentioned. The defendant filed a motion

to dismiss, on the same grounds as theretofore, and the court sustained the motion to dismiss and dismissed the action (R. 31).

SPECIFICATIONS OF ERROR.

The assignments of error appear on page 33 of the record. They allege that the court erred in holding the Act constitutional and not in violation of the equal protection clauses of the Fourteenth Amendment and of the Constitution of the State of Washington, and of the Alien Land provisions of the Constitution of the State of Washington and the Treaty between the United States and the Empire of Japan.

The question for decision is whether the amended bill of complaint states a cause of action.

THE JURISDICTION.

By the terms of the act, "land" includes "the right to the control, possession, use, enjoyment, rent, issues or profits thereof except a mortgage," etc. (Section 1 [b]). "Title" includes every kind of legal or equitable title (Section 1 [e]). An alien may not own land or take or hold title thereto. Land conveyed to or for the use of aliens shall be for-

feited to the state (Section 2). Whoever knowingly transfer or conveys land or title to land to an alien, and an alien who having title to land or control, use or enjoyment of land, whenever acquired, refuses to disclose the fact to the Attorney General, is guilty of a gross misdemeanor (Section 7), which is punishable by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars, or both (Remington & Ballinger's Ann. Codes & Stat., Sec. 2267).

Obviously "land," as defined, includes a lease of land. Upon the execution and delivery of the lease, the leasehold interest would, by the terms of the act, *ipso facto* be forfeited to the state, and Nakatsuka would still be liable for the payment of the rent reserved, although possession and use of the land be ended. The state could make any disposition whatever of the leasehold interest, irrespective of appellants' wishes, without rent during the term, unless the Terraces might be able to collect the same from Nakatsuka; and, in addition, the Terraces would be liable under the criminal penalties prescribed by the act. And of course, if Nakatsuka did not report the making of the lease to the Attorney General, he would be similarly criminally liable.

Obviously no land owner can do other than sub-

mit to the act, if equity jurisdiction does not exist. Similarly, no tenant can run the risk imposed by the act. Nor can he test the validity of the act, whatever be his willingness, unless and until he can find a landowner who is willing to incur the forfeiture and suffer the criminal punishment. In addition thereto, the Fourteenth Amendment is invoked, and the act prohibits the Terraces from making use of their land as they otherwise might and prevents Nakatsuka from even using the land.

These facts establish the jurisdiction within the following cases:

Ex Parte Young, 209 U. S. 123.
Raich vs. Truax, 219 Fed. 273.
Truax vs. Raich, 239 U. S. 33.
Buchannan vs. Warley, 245 U. S. 60.

PROPOSITIONS DISCUSSED.

The propositions we desire to discuss are as follows:

1. The state constitutional provision is exclusive of all disabilities of aliens respecting lands and the legislature had no power to add thereto.

2. The act takes the property of the parties without due process of law, in that it prohibits Na-

katsuka from following a common occupation of the community, and makes it a criminal offense for the Terraces to avail themselves of Nakatsuka's services in any capacity other than a mere wage earner, and prohibits them from making a lawful use of their property.

3. The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end.

4. The act imposes an impossible condition, the declaration of intention in good faith to become a citizen of the United States, and hence Nakatsuka is freed from the obligation of compliance therewith.

5. The act is in violation of the Treaty between the United States and Japan, in that it prohibits the leasing of land for commercial purposes, and prohibits Nakatsuka from doing everything necessary for or incident to trade, on the same terms as citizens.

ARGUMENT.

I.

THE STATE CONSTITUTIONAL PROVISION IS EXCLUSIVE OF ALL DISABILITIES OF ALIENS RESPECTING LANDS AND THE LEGISLATURE HAD NO POWER TO ADD THERETO.

Section 33 of Article II of the Constitution of the State of Washington relating to alien ownership of land, has been before the Supreme Court of the state a number of times and its meaning and purpose has been definitely settled by the court. Those decisions chronologically arranged are as follows:

Oregon Mortgage Company vs. Carstens, 16 Wash. 165:

In that case, the mortgage company, an alien corporation, took a mortgage on real estate as security for the payment of money loaned. The mortgagor was unable to pay the mortgage and he and the mortgagee company entered into an agreement by the terms of which he executed a deed of the land to one Livingstone, as trustee for the plaintiff, and Livingstone subsequently deeded the land to the plaintiff mortgage company, and it entered into a written agreement to sell the land to Carstens and Carstens to buy the land of the mortgage company.

Carstens thereafter declined to pay the purchase price and the mortgage company brought suit to recover the amount thereof. The court held:

1. A deed to an alien, in violation of law, will pass a title to real estate good against all the world except the state, and one which only can be attacked in a direct proceeding on the part of the state.

2. An alien holding land in this state under a defeasible title, which is subject to attack on the part of the state as in contravention of the above constitutional provision, may by deed transfer a good title thereto to any person entitled to hold real estate, if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien.

3. The above constitutional provision does not apply to cases in which a citizen deeds to an alien mortgaged land in satisfaction of *bona fide* mortgage debt, because the provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts."

In the course of its opinion the court said:

"The plaintiff contends that this land was acquired within the exception contained in the constitutional provision; that is, that the title was acquired under mortgage or in good faith in

the ordinary course of justice in the collection of a debt. It is conceded that McIntosh was the owner of the lands in fee simple, and that the deeds were all sufficient in form to convey the title. *It is plain that the purpose of the prohibition is to prevent the acquisition of lands in large quantities by alien and non-residential owners.* It is apparent by the exception referred to that it was not intended that the provision should be construed so as to prevent the loaning of money by aliens upon real estate security within this state; *but it was contemplated that such loans should be permitted and protected,* of course with the limitation that such transactions must be bona fide. In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts.

"It will readily be seen, that an agreement such as was here entered into between McIntosh and the plaintiff would usually tend to the advantage of both parties. The costs of the foreclosure suit would be avoided, and as well the liability to a deficiency judgment upon the part of the mortgagor. It would seem that there could be but two objections urged against it as tending to defeat the purpose of the provision. One is that, in case of a foreclosure in the courts, the mortgagor would have a right to redeem the premises. But this is a personal right which he might or might not exercise, at his option. We presume it will be conceded that he could waive the right to redeem after a judgment of foreclosure, and we see no reason why he should not be permitted to waive this right

at any time, if he should deem it to his advantage in order to avoid costs and a liability for a deficiency. The other objection is that, in case of a foreclosure and public sale thereunder, other parties would be entitled to bid for the lands and the result might be, in consequence of this, that the alien plaintiff would not become the purchaser."

"The respondent contends that, if a proceeding like this can be sustained, it would be an easy matter for an alien desiring to obtain a tract of land in this state to go through the form of making a loan thereon and immediately thereafter take a deed in satisfaction of the mortgage and thus avoid the prohibition. But we are unable to see why, in case of a fraudulent arrangement between the mortgagor and the mortgagee, such a proceeding could not as well be carried out through the form of a foreclosure. The loan could be made in so large an amount and so great a price bid for the lands upon the foreclosure sale thereunder as to prevent other parties from becoming purchasers, and it would seem that the provision could be as readily violated in the one case as in the other."

"Alien corporations are not prevented from acquiring and holding lands in this state in all cases, and the objections urged against this transaction are substantially only to the form of acquiring title to lands upon which mortgage security has been taken. *It is evident that the clause, 'and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void,' is limited by the other provisions contained in the section, and that it was not intended to prevent an alien from holding land under any circumstaces.* It simply goes to

the means or purpose of the alien in acquiring title. In other words, in cases like this, the original purpose must not have been to acquire title to the lands under the transaction or guise of a mortgage loan, but must have been in good faith to make the loan as a loan, and the mortgage taken as an incident merely to secure its payment, and the land acquired in good faith thereunder. It is apparent that the form of the conveyance is of little or no consequence, unless it should tend to defeat the purpose of the provision."

Answering the contention that land could be acquired under the constitution by process of mortgage foreclosure only, and not by direct deed from the mortgagor to the mortgagee in satisfaction of the indebtedness, the court said:

"The clause in the provision, 'in the ordinary course of justice in the collection of debts,' should not be held to require a proceeding in court in the case of a mortgage debt. The language used does not require it necessarily, and such a construction would go to the form rather than the substance of the transaction. It would afford little or no protection against an attempted fraudulent acquisition. While it is true that a foreclosure might result in a sale to a resident, it is a well known fact that the usual result is a sale to the mortgagee. There is no attempt or desire upon the part of the mortgagee to retain these lands. On the contrary it is attempting to dispose of them, and it is evident that the whole transaction has been conceived and carried out in the utmost good faith to collect its debt; and while a direct provision of the constitution as to the form of the

conveyance, even, could not be disregarded, there is none in the way here, and it will be time enough to inquire into the validity of such transactions when fraud is charged and the desired protection invoked by a proceeding upon the part of the state."

"It is not an unusual proceeding for a mortgagor to convey lands directly to a mortgagee in satisfaction of a mortgage debt, and, where the parties agree upon such a course, it would seem as though it should be favored in a case like this rather than discriminated against. The only just and effectual enforcement of the constitutional inhibition can be by a proceeding upon the part of the state to have the transaction adjudged fraudulent and invalid, and actual fraud of course could always be inquired into. It would be idle to assume that the state has not ample power to protect itself in such matters, and it might be just as necessary and desirable to resort to such a proceeding where title was acquired through the form of a mortgage foreclosure as in case of a direct deed by the mortgagor to the mortgagee."

Goon Gan vs. Richardson, 16 Wash. 373:

That case was a mortgage foreclosure, and the court held that the incapacity of a mortgagee, by reason of alienage, to take title to real estate, might be shown only in a suit by the state.

State ex rel. Winston vs. Morrison, 18 Wash. 664:

That was a direct proceeding by the state to set aside a ninety-nine year lease of real estate to an

alien who had not declared his intention to become a citizen of the United States. Granting the relief prayed for the court said:

> "It is conceded that the premises described in the lease do not fall within any of the exceptions enumerated in the proviso contained in the foregoing section. Respondent contends that it is only absolute ownership of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which this is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of ninety-nine years can be sustained, then why not one for nine hundred and ninety-nine years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless, and parties may indirectly accomplish a result which they are forbidden to do directly. After a vain search for authority bearing directly upon the question we have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void."

State ex rel. Winston vs. The Hudson Land Co., 19 Wash. 35:

This was a direct action by the state to set aside certain conveyances of real estate and a lease of real

estate for forty-nine years, to a corporation the majority of whose stockholders were aliens at the time of the commencement of the action, although at the date of the conveyance and the making of the lease, the majority of the stockholders of the corporation were citizens. After quoting the above constitutional provision, the court said:

> "It seems to us that this language is not susceptible of construction. *A plain policy was plainly enunciated by the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso,* and the constitutional convention, having in mind, no doubt, the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, viz, that
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> " 'Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition.'
>
> "We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation, and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could,

and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the *ownership* of lands by aliens should be prohibited, and that it could be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection, action which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick

to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void under the doctrine announced in *State ex rel. Attorney General vs. Morrison, supra.*"

Morrell vs. Superior Court, 33 Wash. 542:

In that case the court held that an alien corporation could not acquire real estate in this state by eminent domain.

Abrams vs. The State of Washington, 45 Wash. 327.

In that case it appears that Abrams, the plaintiff, in 1890, conveyed real estate in the State of Washington to Lou Graham, an alien, who died in 1903, intestate. In 1894, Graham filed her declaration of intention to become a citizen of the United States but never took any further steps to acquire citizenship. After the death of Graham, Abrams instituted the above action for the purpose of recovering possession of the property, basing his claim on the fact that the real estate had been

acquired by Graham while an alien and that she had never become a citizen. In the same case the State sought to escheat the property, because it had been acquired by Graham while an alien, basing its contention on the proposition that Graham's application to become a citizen was not made in good faith. The court held that the deed from Abrams to Graham conveyed an absolute title, so far as Abrams was concerned, and that the State not having sought to forfeit the property in question during the lifetime of Graham, could not do so after her death, but that her heirs took a fee simple title to the real estate. In the course of its opinion the court said:

> "The appellants the State of Washington and County of King claim title by escheat, on the theory, that Lou Graham was at all times an alien; that her declaration of intention to become a citizen of the United States was void; that she being an alien of notoriously bad character and an habitual violator of the law could not be held to have made such declaration of intention in good faith; that she was prohibited by the terms of our constitution from acquiring title to the real estate by purchase; that as against the state, the deed to her was void; that she had no inheritable blood and could not upon dying intestate transmit title to her alien heirs, and that the property by operation of law and without any proceeding in the nature of office found, upon her death escheated to the state. In view of our conclusions, it will not be neces-

sary for us to determine whether her declaration of intention was, in contemplation of our constitution, made in good faith. We will consider this case upon the theory that she never made any such declaration. Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her by the appellant Abrams was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed. This court, in substance, held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham, after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the state of Washington could not therefore, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have succesfully intituted proceedings to declare a forfeiture and escheat.

"The question now before us is whether, by reason of the death of Lou Graham, the state has lost its right to institute proceedings in the nature of office found for the purpose of declaring a forfeiture and escheat, or whether such right still continues. Under our constitution, an alien, who has not in good faith made any declaration of intention to become a citizen of the United States, *may acquire title to real estate (1) by inheritance; (2) under mortgage*

or in good faith in the ordinary course of justice in the collection of debts; (3) in lands containing valuable mineral deposits, etc., and (4) in land necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom. When the *constitution authorized* aliens *to acquire lands* in these several instances and methods, it was undoubtedly contemplated that they might acquire a *full and complete estate in fee simple,* which would include an estate of inheritance. If this be a correct interpretation, then the estates thus acquired could be transmitted by descent to the heirs of such aliens. It is contended by the state, however, that Lou Graham only acquired a defeasible estate to the land in question, and that, as she was an alien and did not at common law have inheritance blood, she could not transmit any title or estate to her alien heirs, although under the constitution they, as aliens, could receive. In other words, there existed a disability upon her part to transmit, and not upon their part to receive by inheritance. As above stated, the common law of England was so modified by the statute of 11 and 12 Will. III ch. 6, in the year 1700, as to enable English subjects to inherit from an alien. This statute having been enacted prior to the separation of the American colonies from the mother country, has become a part of the common law of this state, except in so far as it has been supplanted by our constitution or statutory enactments. Under this rule and without the provisions of our constitution, a citizen could inherit from an alien an estate held by such alien at the date of his death, even though it has been defeasible.

"When our constitution *conferred* upon

aliens the *right to inherit,* we interpret it to have *conferred* upon them a *full and complete right of inheritance,* which would imply not only the right in themselves to receive by such inheritance from a citizen, but also to receive by inheritance from an alien. Were we to place any other interpretation upon the constitution, the necessary result would be that where an alien, under its authority, had rightfully acquired a fee simple title to real estate, for instance by mortgage, or in good faith in the ordinary course of justice in the collection of a debt, and had immediately thereafter died intestate, his heirs, if aliens, would not be able to inherit such real estate, not because of any disability upon their part, but because their deceased ancestor had not inheritable blood enabling him to transmit title to them. Such an interpretation would result in a rule of law causing such property to escheat to the state whenever there was a failure of heirs who were citizens of the United States. No such contingency was contemplated by the framers of our constitution, nor by the people who adopted the same. Our conclusion is that, under our constitution, aliens are entitled to inherit real estate in this state, from, by, or through ancestors whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of Lou Graham by proceedings in the nature of office found, at any time prior to her death, the real estate in controversy descended to her alien heirs who were authorized to receive the same and became entitled thereto, and the state thereupon lost its right to declare any escheat by forfeiture.

"Our conclusions are, (1) that the deed

from the appellant Abrams divested him of title to the property; (2) that at all times prior to alienation of the property by Lou Graham, or prior to her death, the state was entitled, by proceedings in the nature of office found, to have declared a forfeiture or escheat; (3) that the state, having failed to declare such forfeiture or escheat prior to her death, lost its right so to do; (4) that upon her death, the real estate descended to her alien heirs. In view of these conclusions, the judgment of the honorable superior court was right, and it is accordingly affirmed."

State ex rel Atkinson vs. World Real Estate Commerce Company, 46 Wash. 104:

That was a direct action by the state to escheat real estate. An alien had acquired title to the real estate, contrary to the above constitutional provision, and had conveyed the real estate to the defendant prior to the commencement of the above action. The court held that the alien had conveyed a valid and indefeasible title to the defendant and that upon such conveyance the state lost its right to escheat.

State ex rel Atkinson vs. Evans, 46 Wash. 219:

That was a direct proceeding by the state to escheat land, which it was admitted were not acquired under mortgage or execution, or by inheritance, but contained silicated clay, but it was con-

tended that such deposits were not "minerals, metals, iron, coal, or fireclay," within the meaning of the proviso of the constitutional provision. The court held that the lands were within the excepted class, and in its opinion quoted with approval from Cooley on Contitutional Limitations, as follows:

> "The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, Ch. J. said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural

sense, and to have intended what they said.' "

Prentice vs. How, 84 Wash. 156:

In that case the court reaffirmed the rule that only the state can question an alien's title to real estate, and then only prior to conveyance of the real estate by the alien.

Roger vs. Whitman, 56 Wash. 190, 193:

In that case the court held that the real estate of a citizen, who becomes expatriated, cannot be forfeited.

State ex rel Tanner vs. Staeheli, 112 Wash. 344:

That was a direct action by the state to escheat real estate to the state. The defendant was born in Switzerland and after he came to this country, his father was duly naturalized, and the defendant alleged that he supposed the naturalization of the father resulted in making him a citizen of the United States, that he exercised all the rights of a citizen until the year 1917, then he was required to respond for military service, and at that time he claimed exemption from military service on account of the fact that he was alien born, and was past twenty-one years of age when his father was naturalized. After the action was brought defendant filed his declaration of intention to become a citizen of

the United States, which was held unavailing, and a decree was entered for the state. In the course of its opinion the court said that

> "This land is agricultural land, not valuable for minerals or used for manufacturing purposes, and was not acquired by inheritance or under mortgage, or in the collection of a debt."

State ex rel Turner vs. Rychen, 113 Wash. 90:

That case is similar in all respects to the case last above cited, and the same result was reached by the court.

By the foregoing decisions, the following propositions are established:

1. The purpose of the constitutional provision is to prevent the acquisition of land in large quantities by aliens and non-resident owners, but it was not intended to prevent an alien from holding land under any circumstances.

2. An alien who has not declared his intention to become a citizen of the United States may acquire an absolute fee simple title to real estate in the State of Washington by inheritance, under mortgage foreclosure, in good faith in the ordinary course of justice in the collection of debts, and also to lands containing valuable mineral deposits, as

well as lands necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom.

3. In all cases other than those last mentioned, a conveyance of real estate to an alien creates a defeasible title in the alien, and can be attacked only by the state, and by it only prior to conveyance by the alien.

4. An alien may lawfully lease land in the State of Washington for a reasonable term.

5. That the constitutional provision is self-executing.

Applying the familiar rule of construction, *expressio unius est exclusio alterius,* it follows that the act transcends the power of the legislature. When in the constitutional provision certain disabilities with respect to land were imposed upon aliens, it must have been the purpose of the framers of the constitution to make such disabilities exclusive on that subject. In other words, it was contemplated that only *ownership* of lands should be prohibited, and the legislature was thereby rendered powerless to impose other and further disabilities. The change effected by the provision makes this apparent. At common law an alien had

no inheritable blood; he could take title to real estate by grant or conveyance, but had no capacity to hold, and the lands were at once subject to forfeiture by the state upon office found.

Governeur vs. Robertson, 11 Wheat. 332.
White vs. Bunley, 20 Kan. 235.
Hauenstein vs. Leynham, 100 U. S. 483.
Abrams vs. State, 45 Wash. 327.

Hence, the constitutional provision was not necessary for such purposes. It cannot be said that it is a grant, because the State Supreme Court holds that it is prohibition.

Oregon Mortgage Co. vs. Carstens, (*supra*) 16 Wash. 165, 167:

Being a prohibition it must, according to familiar rules of construction, be given effect as such. The only way that can be done is by giving it the effect we urge. And that construction necessarily follows from the State Supreme Court decision in *State ex rel. Winston vs. The Hudson Land Co.* (*supra*) 19 Wash. 85, 86, where, speaking of the purpose of the provision, the Court said:

> "A plain *policy* was plainly enunciated, by the *constitutional convention.* That policy was on inhibition of *ownership* of lands by aliens except as to the character of lands specifically mentioned in the proviso. * * * "

In the case of *State ex rel Barker vs. Assurance Co.,* 251 Mo. 278, the court had under consideration the question of jurisdiction in injunction in aid of its jurisdiction in *quo warranto,* and quoted with approval from the decision of the Supreme Court of Ohio in the case of *State ex rel Ellis vs. Cuyahogo County,* 70 O. S. 341, as follows:

> "The present action is a resort to our original jurisdiction. That we have not original jurisdiction of suits for injunction is entirely clear. If the language of sec. 5573, Revised Statutes, should be thought appropriate to confer it, the effect to be given to that section would nevertheless be indicated by sec. 2 of Art. 4 of the Constitution, which ordains that 'it (the supreme court) shall have original jurisdiction in *quo warranto, mandamus, habeas corpus,* and *procedendo,* and such appellate jurisdiction as may be provided by law.' Applying to this grant the maxim, *expressio unius est exclusio alterius,* the conclusion is irresistible that the general assembly cannot add to the enumerable subjects of our original jurisdiction."

In the case of *Nunnemacher vs. State,* 129 Wis 190, the question before the court was of the power of the legislature to impose license taxes. The constitutional provision empowered the legislature to impose taxes upon property and in disposing of the question the court said:

> "This contention is that by sec. 1 of Article 8 of the Constitution taxes can only be levied on property. This provision is the only general

provision of the Constitution upon the subject, and reads as follows: 'The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.' The argument is that this provision, by the rule of *expressio unius est exclusio alterius,* prohibits the levy of any taxes in this State except taxes upon property; and that, as inheritance taxes are held to be excise taxes upon the right to take property, and not taxes upon property, they cannot be levied in this state. * * *

"In approaching the question we start with the familiar proposition that the legislature has all the usual and necessary governmental powers, including the power to levy taxes upon occupations, privileges, franchises, and the like, as well as upon property, unless such power has been taken away by the Constitution. There are no express words in the Constitution limiting taxation to property taxation, but the question is whether sec. 1 of Article 8, above quoted, has the effect of such a limitation under the familiar rule of construction, *expressio unius est exclusio alterius.* If we were compelled to decide this question upon the bare words themselves, without the help of the debates occurring in the constitutional convention when this section was formulated, and without the help of subsequent practical construction, the argument would be strong in favor of the plaintiff's contention. But we have a brief record of the constitutional debates, and we have fifty years of practical construction since the adoption of the Constitution and both must be considered."

The court then reviewed the debates in the Constitutional Convention at the time of the adoption of the above constitutional provision and con-

cluded therefrom that it was not the purpose of the constitutional convention to bar the legislature from imposing license taxes.

In this state there has been no legislation on the subject subsequent to the adoption of the constitution and prior to the enactment in question. But, on the other hand, the practical construction given the provision has always permitted the leasing of lands by aliens.

An examination of the constitution reveals the fact that when the convention contemplated legislation on or in connection with the subject of a constitutional provision, that fact was plainly stated.

When reading the Washington constitution, one is forcibly impressed with the fact that a large part of it consists of directions to the legislature to take affirmative action, which provisions are made mandatory by section 29 of Article I thereof, reading as follows:

> "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."

The appellee argues that a state constitution is merely a limitation of legislature power, and that by reason of that fact the rule we contend for does not apply. But, it has been observed that the Wash-

ington constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction, in a large part, to the legislature to take affirmative action.

In other words, the constitutional convention did not proceed on the theory that it was framing a series of limitations on legislative powers, but proceeded on the opposite theory, namely, that it was directing the legislature what it should do, and inserted a provision making all of the provisions of the constitution mandatory, unless in direct words they were stated to be otherwise. Therefore, the question is not disposed of by the application of the rule that a state constitution is merely a limitation of legislative power. That rule is not an unyielding one, but is adopted merely for the purpose of construction and in aid of a determination of the meaning of the instrument itself.

Again, an examination of the constitution reveals the fact, unmistakably apparent, that when the convention expected or intended action on the part of the legislature, that fact was plainly stated, and was not left to inference.

It is also to be borne in mind that the meaning of constitutions is to be sought in the plain language of the people who adopted them, and that the lan-

guage is to be taken in its general and ordinary sense, and as the people generally understand it.

In the case of *State ex rel Atkinson vs. Evans,* 46 Wash. 219, the court, in speaking of the provision in question, said:

> "In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, Ch. J. said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.' "

In the case of *Bronson vs. Syverson,* 88 Wash. 264, 275, the court said:

> "As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject-matter or the context indicates that the limited sense was intended. Says Mr. Justice Story:
>
> " 'Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or

logical subtilities, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them, the people adopt them; the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit to them an recondite meaning or any extraordinary gloss.' 1 Story, Constitution (5th ed.) Sec. 451.

"So Sedgwick in his work in Constitutional Law:

" 'In the consideration of these questions it may be observed in the first place, that, in the construction of a constitution the rule is, 'its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judge it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense.'

"In 6 R. C. L. 52, under title, 'Constitutional Law,' it is said:

" 'Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be

> applied in interpreting statutes and acts of the legislature. This gives rise to the recognized rule of construction that it is presumed that words appearing in a constitution have been used according to their plain, natural and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent. This rule does not apply, however, to technical words and phrases which necessarily should be given a technical signification.' "

If the foregoing rule be followed, and if the purpose of the framers of the constitution be sought with the idea in mind that constitutional provision must be interpreted in the light of the plain general meaning of the terms used, it must necessarily follow, that to the ordinary mind the expression of one disability carries with it the idea of permission of those things not prohibited. This, indeed, is merely the application of the common understanding of the use of language, when understood in its general meaning.

Referring again to the provision in question, it will be observed that the last sentence thereof reads as follows:

> "Every corporation, the majority of whose capital stock is owned by aliens, shall be considered an alien for the purpose of this prohibition."

It is impossible to read that sentence without receiving therefrom the impression that the framers of the constitution intended the disability therein created to be the only disability which should attend alien ownership of stock in corporations. We submit and it cannot be doubted, on the application of any applicable rule of construction, that the legislature has no power to add to the prohibition of the foregoing provision. And if that conclusion be sound, and we cannot doubt that it is, it renders certain the ultimate conclusion that when the framers of the constitution adopted the section in question, it was their purpose to make the disabilities therein enumerated exclusive, and not to leave to the legislature power to add thereto.

In the case of *United States vs. Arrendondo,* 6 Peters, 691, 725, this court said:

> "*Expressio unius est exclusio alterius,* is an universal maxim in the construction of statutes."

That maxim has been applied, as the reported cases show, in the construction of constitutions as well as of legislative acts. And we submit that the rule is applicable to the constitutional provision in question, and that when it is applied it results in the conclusion that the legislature has not power to prohibit the leasing of lands by citizens to aliens

and by aliens from citizens.

It must be remembered that the questions arising out of the presence of aliens on the Pacific Coast was one with which the people were familiar at the time of the adoption of the constitution of the State of Washington. The records show that such questions had even reached this court for decision. It must be assumed that the framers of the Washington constitution were familiar with the questions arising from residence of aliens in the state and that the constitutional provision in question was adopted after mature and deliberate consideration. So assuming, when the framers of the constitution deliberately adopted a *policy,* as the state supreme court held, respecting lands and aliens it necessarily follows that the policy as adopted was intended to be the policy of the new state, with respect to the right of alien in or to lands or their use.

The lower court, after citing some of the Washington decisions heretofore cited in this brief used the following language:

> "From the foregoing, it is clear that the supreme court of Washington has held the common law only changed by this constitutional provision to the extent plainly exercised therein. The exceptions in the constitutional provision constitute a grant to the alien and, of course, are not subject to legislative change or

limitation, at least by the State. But it does not follow because the constitution prohibits alien 'ownership' of lands with certain exceptions, that, the constitution not having defined what shall constitute ownership, the legislature may not do so. The legislature is not bound to leave courts to speculate upon that subject."

Clearly that conclusion is not well founded because there exists in the constitutional provision no ambiguity as to what was meant by "ownership;" ownership with respect to real estate can mean just one thing and that is ownership, the meaning of which everybody knows and understands. But, if the legislature had the right to define what "ownership" meant then it was the right without limitation. Suppose the legislature, instead of passing the act in question, had in an act defined ownership within the meaning of the constitutional provision as any term of years not exceeding one hundred, during which the alien might exercise every right incident to ownership of land in the State of Washington; would anyone for a moment contend that the legislature had power so to do? Suppose the legislature had provided that aliens holding a defeasible title to land might hold the same during their lives and the lives of heirs then in existence; would anyone argue that the legislature had power so to do?

Again, it will be observed that when a matter

was made the subject of a constitutional provision, which the framers of the constitution intended should be permitted or prohibited, under such regulations as the legislature should provide, the fact was plainly stated, and not left to inference. This is true even of matters on which the legislature, without limitation in the constitution, would have had absolute power. Therefore, if it had been the purpose of the framers of the constitution to prohibit the possession, use, control, leasing or enjoyment of the rents, issues and profits of real estate, the context of the entire constitution shows that such fact would have been plainly stated in the constitution, as it was in other matters, which were the subject of a constitutional provision. When, therefore, a plain policy was enunciated by the constitutional convention, and when that policy was a prohibition of *ownership* of land by aliens, and when the constitutional convention did not expressly provide that the use, possession, control, leasing, and enjoyment of rents, issues and profits of real estate was subject to legislative prohibition, it must follow that the policy so established by the legislature was exclusive, and that the matter was not left to legislative action.

We respectfully submit that the legislature has

no power to enact the measure in question.

II.

THE ACT TAKES THE PROPERTY OF THE PARTIES WITHOUT DUE PROCESS OF LAW, IN THAT IT PROHIBITS NAKATSUKA FROM FOLLOWING A COMMON OCCUPATION OF THE COMMUNITY, AND MAKES IT A CRIMINAL OFFENSE FOR THE TERRACES TO AVAIL THEMSELVES OF NAKATSUKA'S SERVICES IN ANY CAPACITY OTHER THAN A MERE WAGE EARNER, AND PROHIBITS THEM FROM MAKING A LAWFUL USE OF THEIR PROPERTY.

It has seemed to us that all that is necessary to dispose of the question in this case is the application of fundamental principles. Among such are the due process clause of the Fourteenth Amendment and a similar clause to the constitution of the State of Washington. The meaning of the due process clause of the Fourteenth Amendment has been so often stated by this court that a citation of authorities is unnecessary, but it may be of assistance to notice the plain, unequivocal language in which this court has declared its effect.

In the case of *Butchers' Union Slaughter House and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter House Company*, 111 U. S. 746, 754, Mr. Justice Bradley used lan-

guage which has been frequently quoted by this court with approval, and never, so far as we can find, has his statement been questioned:

> "The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen."

To the same effect are:

Barbier vs. Connolly, 113 U. S. 27, 31.

Powell vs. Pennsylvania, 127 U. S. 678, 699.

Allgeyer vs. Louisiana, 165 U. S. 578, 589.

Yick Wo vs. Hopkins, 118 U. S. 356, 370.

Coppage vs. Kansas, 236 U. S. 1, 14, 19.

Truax vs. Raich, 239 U. S. 33, 41.

It cannot be disputed that working on a farm and farming and the raising of agricultural products is one of the common occupations of the United States and particularly the State of Washington. It may be stated without fear of contradiction, that the right of an alien to work on a farm for wages is a right which no act of legislature could prohibit. Having the right so to work, no act of the legislature

could prohibit him from receiving compensation therefor, as, to prohibit him from receiving compensation for his work, would be equivalent to prohibiting him from working.

Adams vs. Tanner, 244 U. S. 590.

The amount of compensation to be paid is a matter wholly of agreement between the parties. Hence, if the employer is willing to give to the alien, and the alien is willing to accept, a percentage of the net profits produced by the combined work of the employer and the employee, such a contract may be lawfully entered into and cannot be prohibited by the legislature. We are assuming, of course, that the alien is neither a minor nor a person of unsound mind. It is perfectly clear that if a citizen, owning agricultural lands, desires to employ an alien as superintendent of his agricultural operations and the alien is willing to perform the duties thereof, such a contract may be made and cannot be prohibited by the legislature. It is also clear that the compensation, in such cases, to be paid for such services is a matter of contract between the parties; that it may be fixed at a stipulated sum in money payable at such time or times as is agreed; or that it might be fixed at a percentage, of the receipts, net or gross, resulting from such operation. It is

equally clear that if a citizen land owner desires to absent himself from the scene of his agricultural operations, he may lawfully enter into a contract with an alien by the terms of which the alien would become obligated to carry on the agricultural operations of the land owner, and in his name and for his use, and to account to the land owner at a stipulated time or times for the money received from such operation; it is equally clear that the compensation to be received by the alien therefor is a matter purely of contract, and may be fixed at a stipulated sum in money or a percentage of the net or gross receipts arising from the operation, as the parties may agree. It is confidently asserted that an alien has a right to do the acts mentioned in the foregoing instances, and that an act preventing him from doing any of them would be in contravention of the 14th Amendment. Indeed, we do not understand that the Attorney General contends the contrary. Now, suppose that the citizen landowner, instead of desiring to enter into a contract employing the alien to work as a farm laborer or as a superintendent of the farming operations, should desire instead to enter into a contract with the alien by which the alien should do exactly the same thing, that is, obligate himself to farm the land in question,

but, instead of receiving wages from the land owner, or accounting to him for the receipts from the operations, the parties should enter into an agreement by the terms of which the alien agreed to farm the land and to pay the land owner a stipulated sum in money as his share of the profits from said operations. Can it be said. under such circumstances, that the alien is any the less engaged in working as a farm hand than he would be in any of the preceding illustrations suggested? If there is a distinction to be drawn, what is the basis of such distinction? If it be suggested that in the latter case an estate in land is created, the obvious answer is that the Supreme Court of the State in the case of *Tibbals vs. Iffland,* 10 Wash. 451, 457, has held that a lease does not create an estate in land. The further obvious answer is that to create a legal distinction between the two acts is to relegate substance to form, contrary to all of the decisions of this court on constitutional questions.

That the effect of the decision of the Supreme Court in the case of *Tibbals vs. Iffland, supra,* 10 Wash. 451, 457, may not be mistaken, attention may be called to the fact that section 5918 of Remington & Ballinger's Code entrusts the management and control of community real property to the husband

but prohibits him from selling, conveying, or encumbering the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the same is sold, conveyed, or encumbered, and requires such deed or instrument of conveyance to be acknowledged by him and his wife. Section 8745 of Remington & Ballinger's Code requires all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrances upon real estate, to be by deed. The court had before it for decision the question of the validity of an assignment of a lease made by the husband alone. It was contended that the assignment was invalid because the lease was community property and the wife had not joined in the assignment. The court disposed of the question in these words:

> "The respondent was a married man, he had the same right to assign and transfer the lease that he had to dispose of chattels generally, without the consent of his wife (Gear, Landlord and Tennant, sec. 183), and if he was unmarried he could, of course, make such disposition of it as he saw fit. It was therefore immaterial whether he was married or not, so far as the right to make the assignment was concerned."

There is nothing peculiar, in the State of Washington, in the holding that a lease creates no interest

in real estate. The Supreme Court of the State has uniformly held that a contract for the sale and purchase of real estate on deferred payments creates neither a legal nor equitable interest in the real estate. In the case of *Tieton Hotel Co. vs. Manheim,* 75 Wash. 641, 642, the court said:

> "It is a settled rule in this state that executory contracts for the sale and purchase of land do not convey title, either legal or equitable. *Reddish vs. Smith,* 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781; *Pease vs. Baxter,* 12 Wash. 567, 41 Pac. 899; *Churchill vs. Ackerman,* 22 Wash. 227, 60 Pac. 406; *Johnson vs. Sekor,* 53 Wash. 205, 101 Pac. 829; *Younkman vs. Hillman,* 53 Wash. 661, 102 Pac. 773."

It is confidently submitted that, when a lease does not in fact create an interest in real estate, the legislature is powerless to create, by the terms of a lease, that which the instrument itself does not.

In the case of *O'Brien vs. Webb,* 279 Fed. 117, 123, Judge Dooling, speaking for the court in the cropping contract case growing out of the California alien land act, said:

> "It would be indeed a strain to say that an alien may not enter into a contract for agricultural purposes; unless, of course, the law is very clear and unambiguous in preventing him from doing so. Being lawfully within the United States and lawfully an inhabitant of the state of California, his right to the ordinary pursuit of agriculture is not to be deemed curtailed,

provided, always he does not acquire an interest in the land which he is cultivating."

The foregoing is equivalent to the statement that the constitutional right of an alien, lawfully within the United States, to follow any of the ordinary occupations of the country, is confined to the right to work for wages, for another, and that the constitutional right does not extend to an alien's working for himself. The constitutional right of the alien cannot be so limited.

We respectfully submit that the prohibition of the act is contrary to the due process clause of the Fourteenth Amendment, because it is, in effect, a prohibition of the right of an alien to engage in one of the common occupations of life.

The foregoing has been written from the point of view of the alien, but the applicability of the due process clause to the right of the citizen land owner is no less distinct. It is alleged in the bill that the Terraces acquired this property prior to the passage of the act. The direct prohibition of the act extends to any use of the property in connection with an alien. According to the act, the Terraces may not give to their co-plaintiff possession or control or the right to use their real estate, for any purpose whatsoever, for any period of time, however short.

In other words, the property was acquired prior to the passage of the act, and at a time when it might validly and lawfully be leased to a Japanese, but the act now prohibits them so doing by the severest of penalties, both civil and criminal. Their right to use their property in a lawful way has been proscribed by the act, and the highly beneficial use which they had a right to make of the property at the time of its acquisition, has been absolutely cut off. It must be remembered that there is in the leasing of lands to Japanese nothing inherently wrong, but the act is merely *malum prohibitum,* in response to one of those demands which have been so frequently the cause of the passage of the most extreme legislation. In other words, in response to a popular demand, the right to the Terraces to make an inherently lawful use of their land has been cut off, without any recourse whatever therefor. The right of each of the parties to this action, under the due process clause, has been cut off by the terms of the act, and on familiar principles each of them may urge the invalidity of the act from the viewpoint of the other.

In the case of *New York Central Railroad Co. vs. White,* 243 U. S. 188, 197, the court said:

> "In considering the constitutional question, it is necessary to view the matter from the

standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. vs. Pennsylvania,* 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg,* 235 U. S. 571, 576, 59 L. ed. 364, 368, 55 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet as pointed out by the court of appeals in the *Jensen Case* (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer."

In the case of *Mountain Timber Company vs. State of Washington,* 243 U. S. 219, 234, this court said:

"While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. vs. Pennsylvania,* 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg,* 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers."

In the case last cited no employee was a party to the action, although the court considered the act from the standpoint of an employee.

In the case of *Truax vs. Raich,* 239 U. S. 33, it was contended that the employee could not urge the unconstitutionality of the act from the standpoint of the employer. But this court held that, in view of the fact that the act affected the right of both employer and employee, the employee in his action might urge the unconstitutionality of the act from the standpoint of the employer, although the latter was not a party to the action.

In the case of *Buchanan vs. Warley,* 245 U. S. 60, 72, this court said:

> "The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack

> upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

It stands undisputed that the Terraces own the property in question. Of course, ownership carries with it the right to use the property in all lawful ways. In the case of *Buchanan vs. Warley,* 245 U. S. 60, 74, this court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects those essential attributes of property. *Holden vs. Hardy,* 169 U. S. 376, 391. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

It cannot be disputed that a very substantial limitation of the right of the Terraces to use their property results from the provisions of the act prohibiting the leasing of lands to aliens.

In the *Buchanan* case this court held that the legislature could not prohibit a white man from selling his property to a colored man and that an act prohibiting the same was in violation of the due process clause and held that that clause protected persons of color as well as white persons. The act in question, in its ultimate effect, prohibits the Terraces from placing their co-complainant in

charge of their property for any length of time whatever and the sole reason for so doing is because such co-complainant is an Oriental; in other words, the prohibition is based entirely on color. Unless, therefore, such a prohibition may be based entirely on color, clearly the act is void. We will now consider that question.

III.

The Act Violates the Equal Protection Clause of the Fourteenth Amendment, in that it Makes a Classification Which Bears No Reasonable Relation to a Legitimate Legislative End.

The appellants invoke the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

If the act is in violation of the equal protection clause, so far as concerns the alien appellant, the Terraces may invoke the same protection, because their property rights are interfered with by the act.

Buchanan vs. Warley, 245 U. S. 60.

If we understand the decision of the District Court, that court held that the act makes no discrimination whatever, but that all aliens are treated

alike. On pages 19 and 20 of the record, the court said:

> "Still less does the Washington act discriminate against the Japanese for it provides that
>
> " 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States.
>
> "The prohibition by this definition is made applicable to all aliens both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong* (2 Fed., 733) * * *
>
> "The present case is not only to be distinguished from the *Chong* case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands."

Beyond any possibility of question, the act divides aliens into two classes, namely, those who may and those who may not become citizens of the United States. To each of the former class is extended all rights of citizens with respect to real estate, upon the filing a declaration of intention, while the bar of the statute is absolute as to the latter class, because none of them can at any time in good faith file a declaration of intention. If our view of the meaning of the foregoing quotation is correct, we

shall content ourselves with permitting its statement to stand as its own answer. Hence, we shall consider the discrimination made by the act.

Excepting (1) the right of the state to prohibit the ownership of lands within its border, there being no treaty to the contrary, (*Chirac vs. Chirac,* 2 Wheat, 259, 272; *Hauenstein vs. Lyman,* 199 U. S. 483, 484; *DeVaughn vs. Hutchinson,* 165 U. S. 565; *Clarke vs. Clarke,* 178 U. S. 186; *Blythe vs. Blythe,* 180 U. S. 333); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state, (*McCready vs. Virginia,* 94 U. S. 391; *Patsone vs. Pennsylvania,* 232 U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work, (*Atkin vs. Kansas,* 191 U. S. 207; *Heim vs. McCall,* 239 U. S. 173); and, (4) the power to limit the right of the franchise to citizens of the state, (*Yick Wo vs. Hopkins,* 118 U. S. 336, 370); aliens are within the equal protection clause as fully as citizens. In view of the fact that the Attorney General asserts the absolute right of the state to deal with aliens, because of alienage and of the subject matter of the act, as it may desire, we shall call attention to (and we trust we may be

pardoned for quoting from) the applicable authorities in support of the foregoing statement of the effect of the equal protection clause.

In *Ex parte Virginia,* 100 U. S. 339, 345, in speaking of the Thirteenth and Fourteenth Amendments, said:

> "They were intended to take away all possibility of oppression by law because of race or color."

In the case of *Yick Wo vs. Hopkins,* 118 U. S. 356, 359, this court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any peron of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to any difference of *race, color,* or of *nationality;* and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that, 'All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as in-

volving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court." (Italics ours.)

In the case of *Fong Yue King vs. United States,* 149 U. S. 698, 724, this court said:

"By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. (Citing authorities.)

"Chinese laborers, therefore, like *all other aliens* residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."

In the case of *Wong Wing vs. United States,* 163 U. S. 228, 242, this court said:

"A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."

"This has been decided so often that the point does not require argument." (Citing authorities.)

"The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar, in face of the great constitutional amendments which declared that no state shall deny to any person within its jurisdiction the equal protection of the laws."

In the case of *United States vs. Wong Kim Ark,* 169 U. S. 649, 694, this court said:

"Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof' in the same sense as all other aliens residing in the United States." (Citing authorities.)

In the case of *American Sugar Refining Company vs. Louisiana,* 179 U. S. 89, 92, this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, *race, nativity,* religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such

exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes." (Italics ours.)

In the case of *Truax vs. Raich,* 239 U. S. 33, 39, this court said:

> "Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction' as has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins,* 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment) 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"

In the case of *Buchanan vs. Warley,* 245 U. S. 60, 76, this court said:

> "While the principal purpose of the latter (Fourteenth) Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law."

In the case of *Re Tiburcio Parrott,* 1 Fed. 481, there was involved a provision of the California constitution prohibiting corporations formed under the laws of that state from employing, directly or indirectly, in any capacity any Chinese or Mon-

golians, and an act of the legislature passed to enforce the same. While it may be said that no state can lawfully prohibit any alien lawfully residing within the state from working at any of the common occupations of the state, and cannot accomplish the same results by the indirect method of prohibiting anyone from employing such alien, it may not be amiss to notice the no uncertain terms in which both the constitutional provision and the act of the legislature were condemned. On page 492, Judge Hoffman used the following language:

> "Can it be pretended that this law, of the effect of which I have given examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, 'under the guise of an amendment or alteration' to attain quite a different and, as I shall presently show, an unconstitutional object, viz: Two to drive the Chinese from the state, by preventing them from laboring for their livelihood? I apprehend that, to these questions but one candid answer can be given. I am, therefore, of opinion that, irrespective of the rights secured to the Chinese by the treaty the law is void, as not being a 'reasonable' *bona fide,* or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed

class had been Irish, German, or American; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms, as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals."

In the same case, on page 509, Judge Sawyer, in speaking of the Fourteenth Amendment and Section 1977 of the Revised Statutes, said:

> "It will be seen that in the latter clause the words are 'any person' and not 'any citizen' and prevents any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the laws.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian, heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution."

Further, speaking of the decision of this court in the case of *Strouder vs. West Virginia,* the eminent Jurist continued thus:

"In speaking of the act to enforce this amendment, the court further says: Sections 1977 and 1978 of the Revised Statutes, before cited, 'partially enumerate the rights and immunities intended to be guaranteed by the constitution;' and that 'this act puts in the form of a statute what had been substantially ordained by the constitutional amendment.' Id. 228. If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must express the positive provisions of the constitution and act of the legislature of the State of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the State. Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both, in letter and spirit, in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China, and this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the constitution itself and the laws passed to give it effect, irrespective of treaty stipulations."

In the case of *Ah Kow vs. Nunan,* 5 Sawy. 552, there was under consideration an ordinance of the City of San Francisco, commonly known as the queue ordinance, which required the hair of each Chinese to be clipped within an inch of his head.

Mr. Justice Field, in holding the ordinance unconstitutional, said:

> "But in our country, hostile and *discriminating legislation* by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, *is forbidden by the Fourteenth amendment to the constitution.* That amendment in its first section declares who are citizens of the United States and then exacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declared that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offences no greater or different punishment."

In *re Ah Fong,* 3 Sawy. 144, Justice Field held unconstitutional for the same reason, an act passed

by the legislature of California requiring a bond conditioned that Chinese immigrants should not become a charge upon the public.

In *State vs. Montgomery,* 94 Me. 192, the court held unconstitutional an act requiring all peddlers to secure a license, and denying a license to an alien, and in so doing said:

> "Nor can this discrimination be sustained as a constitutional exercise of the police of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar vs. Board,* 131 Mich. 254, the court held unconstitutional an act which required barbers to take out a license, but which denied a license to aliens. In its opinion the court said:

> "But had it (the Board) the right to require citizenship? If it had the right to couple that with other requirements, it would have the right to make that the only requirement."

In *re Opinion of Justices* 207 Mass. 601, the legislature submitted to the court the following inquiry:

> "If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the

constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of 21 years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of 21 years or to serve her with food or drink therein?"

The court quoted from *Powell vs. Pennsylvania,* 127 U. S. 678; *Yick Wo vs. Hopkins,* 118 U. S. 356, and *Barbier vs. Connolly,* 113 U. S. 27, and cited with approval *re Tiburcio Parrott,* 6 Sawy, 349, 1 Fed. 481, and *re Lee Sing,* 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great

interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the prescribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the Legislature may be 'of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the Legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of

the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young women into a hotel or restaurant kept by an American, which it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fe Railway vs. Ellis,* 165 U. S. 150, 165, 'It is apparent, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is only based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' See also opinion by Mr. Justice Field in *Ho Ah Kow vs. Hunan,* 5 Sawy. 552, Fed Cas. No. 6, 546.

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of different color.

"We answer the question in the negative."

The first sentence in the above quotation is the familiar proposition that the keeping of a hotel or restaurant cannot be prohibited under the due process clause of the Fourteenth Amendment. If, however, a legislature has the power asserted in the case at bar, then the opinion of the eminent Justices above quoted, is without foundation, because, to operate a hotel, the proprietor would either have to own or lease the same, and would thereby at least be leasing or using real estate within the meaning of those terms as used in the act in the case at bar. Therefore, the legislature would have had the absolute right to prohibit the ownership, leasing, using or controlling of that real estate, without which the hotel could not be conducted, and having the absolute right thus to prohibit the business *in toto* a partial exercise of less than the whole of an acknowledged power would be valid.

In the case of *Commonwealth vs. Titcomb,* 229 Mass. 14, the court said:

> "It (the legislature) cannot proscribe one class upon the basis of race."

In view of the foregoing authorities, it is submitted that, subject to the exceptions above mentioned, aliens are within the equal protection clause

of the Fourteenth Amendment as fully as citizens, that legislation imposing burdens upon, or limiting rights of, aliens, because of alienage, is void, and that however broad the power of classification may be, classification based upon citizenship as against alienage, or, upon alienage as against citizenship, is void.

The legislature being powerless to discriminate against aliens in favor of citizens and to classify upon the ground of alienage, how can it in reason be said that it may nevertheless discriminate against some aliens in favor of others, or classify aliens among themselves, when all aliens are equally within and protected by the equal protection clause of the Fourteenth Amendment? The Attorney General stoutly argues that it may do so, and that a valid classification has been made by the act in question.

Subdivision (a) of Section 1 of the act subjects to pains and penalties every alien except an alien which the subdivision excludes from the meaning of the word "alien." The language of the subdivision, so far as is pertinent to the case, is as follows:

> "(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens." * * *

The discrimination in subdivision (a) is therefore founded upon the naturalization laws of the United States. They apply only

> "to aliens being free white persons, and to aliens of African nativity and to persons of African descent."
>
> Revised Statutes, Sec. 2169, Act February 18, 185 (18 Stat. 316).

Subdivision (a), if read as the legislature intended in law it should read, and if by incorporating into it the naturalization law, would read as follows:

> "'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, if such alien be a free white person, or of African nativity or African descent, but does include all other aliens."

This conclusively follows, because, as the courts have held, a Japanese is not a white person or a person of African descent, and cannot therefore be naturalized.

In *re Satio,* 62 Fed. 126.

In *re Young,* 189 Fed. 175.

In *re Geronimo Para,* 269 Fed. 643.

The court, in the instant case, so holds. (Record, p. 14.)

Not being subject to naturalization, a Japanese

could not in good faith declare his intention to become a citizen of the United States. The lower court so held, saying:

> "Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file a declaration to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so 'in good faith'." (Record, p. 14.)

Hence, the Attorney General asserts this proposition: Discriminatory legislation may be enacted by Congress because the constitution contains no equal protection clause operative in Congess, and, due to that fact, the natualization act is valid even though it discriminates against the aliens not included within it, and (if the power of naturalization were not granted to Congress) although that act, if passed by the state, would be in contravention of the equal protection clause of the Fourteenth Amendment, the state may nevertheless make that discriminatory act the basis of its classification in the act in question, merely because the naturalization act was passed by Congress and not by the state. This proposition resolves itself into the further proposition, that, on those matters on which both Congress and the legislatures may act, if Congress, not bound by an equal protection clause, passes an

act, any state legislature, although it is bound by the equal protection clause, may enact precisely the same measure, despite the fact that the statement of the proposition is its own answer. But if it be not, it is fundamental that what cannot be directly done cannot be done by indirection.

It is, of course, true that Congress may permit all aliens, or any class of aliens, less than all, to be naturalized, for whatever reason may seem to it sufficient or wise, being bound by no constitutional limitation on the subject. In the case of *United States vs. Wong Kim Ark,* 169 U. S. 649, 694, this court said:

> "Whatever considerations, *in the absence of a controlling provision of the Constitution,* might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, * * ." (Italics ours.)

It must be remembered, further, that in the matter of admitting aliens to naturalization, Congress was dealing with a political subject, and not a property right. The act in question deals not with political rights, but with property rights, because, at common law, and in the State of Washington, prior to the enactment in question, aliens had the absolute right to lease real estate for a

reasonable term, that is a term sufficiently short to have no incident whatever of ownership, direct or indirect.

1 *R. C. L.* p. 823, Sec. 33.

This was the law in the State of Washington from the adoption of the Constitution to the passage of the act in question.

State ex rel Winston vs. Morrison, 18 Wash. 664.

In view of the fact that the naturalization law was passed in the exercise of the unrestrained political right of Congress, and the fact that the act in question attempts to bar the appellants of property rights, and must be found to conform to the requirements of the equal protection clause of the Fourteenth Amendment, it should seem readily apparent that the former act cannot be used as the basis of the classification attempted in the latter.

If, in dealing with subjects which are not matters of property right, the state legislatures are bound to observe the equal protection clause of the Fourteenth Amendment, it would seem obvious that respecting property right similar observance is necessary.

Game and fish are the property of the state, are within the plenary power of legislature, and their

killing or taking may be prohibited to all persons who are not citizens of the state.

McCready vs. Virginia, 94 U. S. 395.
Geer vs. Connecticut, 161 U. S. 519.
Manchester vs. Massachusetts, 139 U. S. 240.
Ex rel Silz vs. Hesterberg, 211 U. S. 31.
Patsone vs. Pennsylvania, 232 U. S. 138.

Therefore, if, with respect to that common property of the state, the legislature may not, consistent with the equal protection clause of the Fourteenth Amendment, prohibit a taking by some aliens while permitting it by others, there can be no escape from the conclusion that the legislature, when dealing not with its own property but with property rights of the inhabitants of the state, cannot discriminate against some aliens in favor of other aliens.

In *re Ah Chong,* 6 Sawy. 45, 2 Fed. 733, Judge Sawyer held in violation of the equal protection clause of the Fourteenth Amendment, and the Treaty with China, a statute of California prohibiting all aliens *incapable of becoming electors of the state* from fishing in the waters of the state. In his opinion, that eminent Justice said:

> "Citizens of other states having no property right which entitles them to fish against the will of the state *a fortiori,* the alien, from whatever country he may come has none whatever in

the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum* without price, charge, let or hinderance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nations,' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation.' And such discriminations are in violation of Articles V and VI of the Treaty with China cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privileges it must permit all others to enjoy upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The fourteenth amendment of the national constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the

equal protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution."

The foregoing case has been cited with approval in the following cases:

County of San Mateo vs. Southern Pacific Ry. Co., 15 Fed. 722.

United States vs. Balsara, 180 Fed. 694.

Re Takai Maru, 190 Fed. 45.

Raich vs. Truax, 219 Fed. 273.

Tragesser vs. Gray, 73 Md. 251.

Commonwealth vs. Cosick, 36 Pa. County Court Reports, 637.

Harper vs. Galloway, 59 Fla. 255.

It was also cited, but not applied, in *Commonwealth vs. Hanna,* 195 Mass. 262, in which it was held that a statute providing that a license as a hawker and peddlers should be granted only to a person who was or has declared his intention to become a citizen of the United States, on the ground that such occupation was a *privilege* and not a property right.

Believing, as we do, that the legislature can no more impose disabilities upon some, but not all, aliens, than it can upon some, but not all, citizens, we call attention to similar cases respecting discriminations against citizens in the taking of game and fish.

In the case of *Harper vs. Galloway,* 58 Fla. 255, the court held in violation of the equal protection clause an act of Florida requiring residents of the state who were not residents of Marion County therein to give notice of an intention to hunt, and the payment of a special license tax for the privilege of hunting in Marion County, but requiring no notice or license tax from residents of Marion County, and in so doing said:

> "The unjust discrimination against residents of other counties in the state who have rights as to the game in the state as imposed by Section 8 of the Act, is in effect a denial to the residents of the state who are not residents of Marion County, the equal protection of the laws of the land and such Section 8 is inoperative as to residents of this state."

In the case of *State vs. Savage,* 96 Ore. 53, the Supreme Court of Oregon held two acts of the legislature of that state, prohibiting the taking of salt water crabs from Coos County for the purpose of sale, and making it inapplicable to those engaged

in the canning business, to be discriminatory class legislation and void under Article I, Section 20, of the State Constitution, reading as follows:

> "No law shall be passed granting to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In its opinion the court said:

> "No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive right of taking and shipping the same kind of fish beyond the limits of the country for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to article I, sec. 20, of the Constitution and void."

In *Poon vs. Miller* (Tex.), 234 S. W. 573, the court held invalid an act to secure a license to engage in the business of selling at wholesale fish and oysters, and providing that no person could procure such license without swearing that he was a citizen of the United States or a naturalized alien. The action was by a Chinaman to enforce a provision in a contract made with him by the defendants to

the effect that they would not engage in the fish and poultry business within certain territory for a certain time. One defense set up was that the plaintiff could not prevail because he had not secured and could not secure a license under the act in question. The court held against the defendants and said:

> "The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen.
> * * * *
>
> "We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China, and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Although there does not appear a direct statement that the Chinese whose rights were infringed by the ordinance involved in *Yick Wo vs. Hopkins*, 118 U. S. 356, were all engaged in the hand laundry business as distinguished from steam laundry business, the opinion clearly indicates that to be the fact, and we submit that this court will take judicial notice of that notorious fact. In that case this

court held invalid a discrimination against Chinese, although there can be no doubt that the state may prohibit the hand laundry business, because in *Quong Wing vs. Kirkendall,* 223 U. S. 59, 83, this Court upheld an act requiring the payment of a license to do hand laundry work but none for the operation of a steam laundry. There Mr. Justice Holmes speaking for the court said:

> "If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

From the foregoing it follows that even though the prohibition is with respect to a business which can be prohibited to aliens and citizens alike, a prohibition with respect thereto against aliens alone, or some aliens, is invalid, as in controvention of the equal protection clause.

An act, similar in many respects to the act in this case, submitted by the initiative and adopted by the electors of California in November, 1920, contains a provision, as does the act in question, prohibiting the proscribed aliens from being appointed guardian of the estate of a minor when the estate consists, even in part, of real estate. That portion of the California act came before the Supreme Court of California in the case entitled *In the Matter of the Estate and Guardianship of Tet-*

subumi Yano, decided May 1, 1922 (not yet officially reported), in which it appeared that the minor was an American citizen, born in California of Japanese parents, who were aliens; that the alien father, resident of California, applied for guardianship of the said minor and that his application was refused by the lower court because of said act. On appeal the Supreme Court held the provision in violation of the equal protection clause of the Fourteenth Amendment, and in the course of its opinion said:

> "Our law provides that the father or mother of a minor child less than fourteen years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. (Code Civ. Proc. Sec. 1751.) This law is general in terms. It is not confined to citizens in its application, but purports to confer the right upon all residents regardless of citizenship. The initiatory act of 1920 (Stats. lxxxiii, sec. 4), by its terms, forbids the appointment of an alien not eligible to citizenship as guardian of a minor with respect to property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan who is the parent of a native born child cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrim-

ination against citizens of Japan residing in this state.

"Section I of Article XIV of the Constitution of the United States declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' We had occasion to consider this language in *ex parte Kotta,* decided on September 12, 1921 (200 Pac. 957). We there said that 'the word (person) as used in this amendment includes aliens,' and quoting from *Yick Wo vs. Hopkins,* 118 U. S. 396, that it applies 'without regard to any difference of race, of color, or of nationality,' and that the guarantee of 'the equal protection of the laws is a pledge of the protection of equal laws.' These statements are quoted and approved by the Supreme Court of the United States in *Truax vs. Raich,* 239 U. S. 33. In *Barbier vs. Connolly,* 113 U. S. 31, the court declared that this guarantee means that 'equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.' It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the equal protection of the laws. In this respect the initiative act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of the laws.

"It cannot be successfully contended that the law may be declared valid in this respect

on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights and privileges which are accorded to others not of that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification 'must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation.' (Italics ours.) (*Darcy vs. Mayor, etc.*, 104 Cal. 645.) A law 'makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation.' (*Ex parte Miller*, 162 Cal. 698.) 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to

the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.' (*Southern R. Co. vs. Greene,* 216 U. S. 417.) The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

The court further held that the provision violated Section 21 of Article I of the state constitution, which declares that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizen."

If the naturalization act had furnished a valid basis of classification by a legislature limited by the equal protection clause, that fact would have resulted in the provision being upheld. Hence, that decision is directly in point and is, in effect that a

state legislature cannot use the naturalization act as a basis of classification of aliens. It must follow that the classification attempted in the act in question in the case at bar must find support, if any it has, not in, but aside from the naturalization act. Hence we proceed to an examination of the act.

In its decision of the case arising out of the California alien land act, *Porterfield vs. Webb,* 279 Fed. 114, that court attempted to answer the question in this manner:

> "It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power, it has limited the right of naturalization to 'aliens being free white persons, and to aliens of African nativity, and to persons of African descent.' This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, *however arbitrary,* and so long as it continues, it furnishes a fundamental and important distinction, which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the court and given expression in the Terrace Case in the following language:
>
> " 'It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the wel-

> fare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged'."

There are a number of answers to that argument: First, if every foot of land within the State of Washington should pass into the ownership or possession of aliens, then little could be said in defense of the act as an expression of representative government. Second, the presumptions which are permissible to the legislature, when enacting a rule of conduct, do not include such a theoretical possibility as to be a practical impossibility. Third, the act of government forcing on a resident within its jurisdiction of a condition which causes him to lack an interest in and power to effectually work for the welfare of the state, and then classifying him on the ground of the necessary result of that condition forced on him, against his will, does not square with the doctrine of American fair play.

Fourth, the statement of the court that a difference, however arbitrary, might be availed of as a ground of classification by a state bound by the equal protection clause of the Fourteenth Amendment is directly contrary to every decision of this court on that point. Fifth, Congress, in passing the naturalization act, was not limited by an equal protection clause, but the state, when passing the act in queston, was, and what cannot be done directly cannot be done indirectly. It is submitted that the queston is not disposed of by the foregoing quotations.

Again, it is to be remembered that the substance of an act of the legislature cannot be concealed by its form. This court, when determining the constitutionality of acts of the state legislatures, has so frequently said that the substance, not the form, of an act must be regarded, as to make a citation of authority to that effect unnecessary. In no instance has the substance of an act been more carefully concealed by its form. This act is nothing more nor less than a legislative declaration that only free white persons, and persons of African natvity, and persons of African descent, may lease, control, use, enjoy, etc., lands within the State of Washington. This is so obvious that the point requres no further argument, nor is it necessary to

cite authority to the effect that the act when so regarded, is in violation of the equal protection clause.

It will be observed that an alien as defined by the act excludes an alien who has declared his intention in good faith to become a citizen of the United States. Such a declaration does not make him any the less an alien in fact, since he remains an alien until he is admitted to citzenship by a decree of one of the prescribed courts. Hence, for the purpose of the act, some aliens are *not* aliens, but other aliens *are* aliens. By the express terms of the act of June 25, 1910, Chapter 401, Section 3, an alien who has so declared his intention may, not less than two years nor more than seven years thereafter, file his petition for citizenship, without which he cannot be admitted to citizenship, By the terms of Section 6 of the Washington Statute, upon failure to secure admission to citzenship within seven years after the filing of the declaration of intention "it shall be presumed that he declares his intention in bad faith." Hence an alien can declare his intention and thereby become eligible to all the rights of a citizen with respect to real estate, in entire compliance with the act, while the prescribed alien, who is in fact no more an alien than the former, is at all times not only barred from similar

rights, but is absolutely barred from declaring his intention to become a citizen of the United States. The said alien who has so declared his intention can fail to apply for citizenship and does not lose his rights, under the act in question, because his failure to file his petition creates only a presumption that his declaration was not in good faith. Hence, he can remain an alien for fourteen years, and still enjoy all the rights of a citizen with respect to real estate, while the other alien can at no time acquire any right whatever according to the terms of the act. The only difference between the alien who has so filed his declaration, under the foregoing, and an alien of the proscribed class, is that the former filed a declaration of intention from which nothing whatever resulted, while the latter has not at any time been permitted to file his declaration of intention. Yet the one is an alien, by the terms of the act, and the other is not an alien, although, in fact, he is an alien to the same extent that he was prior to the filing of his declaration of intention. Classification cannot change facts; such an arbitrary classification is utterly void.

In its opinion, the lower court said, (Record p. 21):

"It is obvious that the objection on the part

of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of the Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of those despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of government. Hence they were denied citizenship. * * * *

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The foregoing quotation suggests the only basis upon which a classification might be made. If under any circumstances the legislature may classify aliens, with respect to the subject matter of the act in question, the classifiication must be founded upon adherence and attachment to, respect for and interest in American Government and its institutions, because, obviously, that is the only *legitimate* end of government for the accomplishment of which the act might in any event be passed.

In the exercise of the police power, the statute must have some fair tendency to accomplish, or

must aid in the accomplishment of, some purpose for which the legislature may use the power, and if the means employed have no real, substantial relation to a public object which government can accomplish, the courts will declare the statute invalid, (*Welch vs. Swasey,* 214 U. S. 191, 195), and classification must be reasonable, not arbitrary, and the equal protection clause requires that the classification shall be upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation, (*Atchinson, Topeka & Santa Fe Railway Co. vs. Vosberg,* 238 U. S. 56, 59), and must be founded upon a distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, (*Southern Ry. Co. vs. Green,* 216 U. S. 400).

As above suggested, the only legitimate end to be accomplished by the act in question is insuring that the rights in or to real estate mentioned in the act shall be exercised only by those persons who adhere and are attached to and who respect the American Government and its institutions. Hence, it remains only to be seen whether the act really and substantially accomplishes that purpose, and whether the means adopted do, in fact, reasonably result in the determination of that ultimate fact,

which must be the basis of the classification attempted. Aliens of the proscribed class, resident in the state, may have the same adherence and attachment to and respect for the American Government and its institutions as the most patriotic citizen in the state, but they are nevertheless proscribed by the act. No means are afforded by which the ultimate fact, which is the legitimate end of such legislation, can be determined, and the question is forever foreclosed by the act, irrespective of the fact. A question, similar in principle, was before this court in the case of *Smith vs. Texas,* 233 U. S. 630, in which case this court held in violation of the equal protection clause an act which made it a misdemeanor for any person to act as a conductor on a railway train without having previously served for two years as a freight conductor or brakeman. In its opinion the court held:

> "The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been frieght conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from

showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

"Or it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of moving the distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation."

The lower court said that the proscribed races were the "Hallmark" of despotism, and that it was that fact to which the legislature objected. History recounts no instance of the despotism approaching that which has always prevailed in Russia, or of that which has always prevailed in Turkey, nor of

the bloody barbarity which has systematically been practiced in Turkey upon the subjects of that government. Yet the Russian and the Turk are admitted to citizenship in the United States, and may have all the rights of citizens of the state with respect to lands within the state. It is a matter of history and common knowledge that those individuals, in the United States, who habitually spend their time and effort in plotting the forcible overthrow of this government are notably from Russia. These being the facts, it cannot be said that the subjects of Russia and Turkey are attached to or respect the American Government or its institutions. It cannot be said that the admission to citizenship of the Zulu, the Kaffir, and cannibal tribes of the Congo and the tribes of Ashantee and Dahomey, all admissible to citizenship in the United States, and hence to the rights of citizens of the state with respect to lands, contribute to the preservation of our form of government and our civilization and its enrichment or the making of our form of government a success by taking in the refinements, social gifts and graces and the firm attachment to republican institutions that have so long made these races an example to Americans. China has been a republic for some years and has been recognized as such by our government, but the Chinese cannot be ad-

mitted to citizenship in the United States, and hence are denied the right of other aliens to lands in the State of Washington. Japan stands among the foremost nations today, not only in civilization, accomplishment, civic pride, but in all those national attributes which make her one of the great recognized powers. Her nationals, resident in America, are notably law-abiding and industrious, and actuated by civic pride to such a degree as stands as an example to American citizens. Many of them have been residents of the state for years, have made it their permanent homes, but despite these facts it is suggested that they are not attached to this government. Do men voluntarily emigrate to live and raise their children in a country and under a government to which they are not attached and whose institutions they do not respect? Common sense and observation dictate a negative answer.

When an act, which concededly must have a substantial relation to the determination of the existence or absence of adherence and attachment to and respect for American institutions and the American government, so utterly fails to accomplish that purpose how can it be said that it is other than an arbitrary fiat formulated in utter disregard of the facts? As we have seen, a resident alien may

have the same requisites and necessary qualities for citizenship as has the most patriotic, but if he is in the proscribed class the fact is utterly immaterial. Likewise, the classification permits the exercise of rights by and extends privileges to aliens from other countries whose history is utterly subversive of all principles on which the American Government is founded, and whose nationals here have been notably connected with plots for the forcible overthrow of this government. The act, however, permits the latter class to exercise all of the rights of citizens with respect to land. From whatever point of view the act be considered, it is plainly apparent that the classification utterly fails of the purpose of valid classifiication and that the act is no more than an arbitrary and capricious fiat.

The vice of this act is that it makes a class within a class. The effect following that fact is nowhere better stated than in *State vs. Julow,* 129 Mo. 163, where the court had under consideration and held void a statute of Missouri, making it an offense to discharge a laborer because of membership in a labor union, to which doctrine this court stands firmly committee (*Adair vs. United States,* 208 U. S. 161; *Coppage vs. Kansas,* 236 U. S. 1), and in the course of its opinion the court said:

"But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class—to all workingmen, etc.—but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, labor union, etc. Where a statute does this—where it does not relate to person or things as a class, but to particular persons or things of a class—it is a special, as contradistinguished from a general, law. *State vs. Tolle*, 71 Mo. 645; *State vs. Herrimann*, 75 Mo. 340. Here a non-trade-union man or non-labor-union man could be discharged without ceremony, without let or hindrance, whenever the employer so desires, with or without reason, while, in the case of a trade union or labor union man, he could not be discharged, if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class and therefore the statute which does this is a special, not a general law, therefore violative of the constitution. Judge Cooley says: 'A statute would not be constitutional which would select particular individuals from a class or locality and subject them to particular rules, or impose upon them special obligations or burdens, from which others in the same class or locality are exempt. Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the providence of free government.' *Cooley Const. Lim.*

391. The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classifiication, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair, or other individual peculiarities, something not competent for the legislature to do. *State vs. Herrmann,* 75 Mo. loc. cit. 353."

The same principle was applied in *Connolly vs. Union Sewer Pipe Co.,* 184 U. S. 540, in which this court held invalid an Illinois statute, exempting agriculturists and livestock dealers from its provisions, and which prohibited combinations in restraint of trade, saying:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit is too manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The same principle was applied in *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis,* 165 U. S. 150. The principle was again applied in *Cotting vs. Kansas City Stockyards,* 183 U. S. 79, in which this court held in violation of the equal protection clause an act of Kansas which limited the amount of the charges to be made by a stockyard company, without limiting the charges to be made by similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute was general in its terms and applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it might make a reasonable income, since the statute made a positive and direct discrimination between persons engaged in the same class of business, and based it simply upon the quantity of business which each might do. In its opinion this court said:

> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently nor with those in which a classification *is based upon inherent differences in the character of the business,* but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the

quantity of business which each may do." (Italics ours.)

In the case of *McFarland vs. American Sugar Refining Company,* 241 U. S. 79, this court held in violation of the equal protection clause an act of Louisiana defining the business of sugar refining as that of "any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it." and created a presumption of participation by a sugar refiner in a forbidden monopoly or combination from the systematic payment in Louisiana by a person or company engaged in sugar refining within that state of a less price for sugar than he paid in any other state, and that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute against monopolies, and provided criminal penalties therefor. Answering an argument to sustain the classification, this court said:

> "As to the classification, if a powerful rival of the plaintiff should do no refining within the state, it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of

> any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it,' as easily might happen with a combination of planters, such as the answer gives us to understand has been attempted heretofore."

The foregoing cases illustrate the rule that a valid classification must have a reasonable relation to a legitimate end of government, and that a classification which has no tendency to the accomplishment of that purpose is void. The vice of the classification attempted in the instant case, because of that lack of reasonable relation to the legitimate purpose of government, is illustrated by the decision in *Atchinson, Topeka & Santa Fe Ry. Co. vs. Vosberg (supra),* 238 U. S. 56, in which the reciprocal demurrage law of Kansas was sought to be upheld on the argument that the classification had a reasonable relation to the object of securing adequate car service. The contention was summarily disposed of thus: -

> "In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates to the object of securing adequate prosecution in court of actions respecting car service."

So in the case at bar, the act must be tested by its supposed relation to making certain that

the right involved may be exercised only by those who adhere and are attached to and respect this government and not by reason of alienage, or those things which are necessarily inherent in aliens because of alienage.

In the case of *Truax vs. Raich (supra),* 239 U. S. 239, (in which the facts are too well known to require their statement), Mr. Justice Hughes, speaking for the court said:

> "The discrimination against aliens in the wide range of employment to which the act relates *is made an end in itself,* and thus the authority to deny to aliens, *upon the mere fact of their alienage,* the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies *action consistent with the legitimate interests of the state."* * * *

Equally in this case as in that, the classification is based wholly upon alienage and the discrimination against the proscribed aliens is likewise made an end in itself, and the classification is not consistent with the legitimate interests of the state, because the means adopted have no reasonable tendency to the accomplishment of the ultimate legitimate object of the state. In *Truax vs. Corrigan* (decided December 19, 1921), Chief Justice Taft, speaking for the court concerning classification, said:

"It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

White men, black men, red men and brown men are, by reason of that fact very different, and there is a vast difference between a man of wealth and a poverty-stricken man as universal everyday experience most forcibly teaches, but a rule of conduct based upon such differences would be clearly invalid. In the case of *Gulf C. & St. R. Co. vs. Ellis,* 165 U. S. 150, Mr. Justice Brewer said:

"The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classifiication."

In the case of *Tanner vs. Little,* 240 U. S. 369, Mr. Justice McKenna said:

"Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those particulars.' *Billings vs. Illinois,* 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. Upon what differences or resemblances it may

be exercised *depends necessarily upon the object in view,* may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered." (Italics ours.)

The foregoing cases clearly demonstrate the rule that classification must be based on real resemblances or real differences having a reasonable relation to a legislative object.

Where is the difference between Japanese, on the one hand, and Russians, Turks, Zulus, Kaffirs, Hatians and the cannibal tribes of the Congo on the other so far as concerns the distinction made between them by this act as a determination of the ultimate, legitimate legislative purpose to insure the rights respecting real estate being exercised only by those who are attached and adhere to and respect the American government and its institutions? And if such a difference exists, can this court judicially say that the difference is not in

favor of the Japanese? Can this court solemnly adjudge that the two respective classes of aliens so resemble their co-aliens, and that between the two classes of aliens there exist such real differences that they may validly be so classed "in accordance with their pertinence to the purpose in hand?"

Aliens cannot be classified on the ground of alienage. Of course, it is fundamental that, the legislature being powerless so to do, it cannot by indirection accomplish the same result by classifying on that which of necessity, by reason of alienage, inheres in the alien. In its opinion (Record p. 21) the lower court said:

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The proposition stated by the court may be put in plainer terms, thus: Government, by its legislative action, may force a condition upon its unwilling subjects, and, having done so, may classify subjects on the basis of the conditions so forced on them. If, as stated by the lower court, it is obvious that Japanese lack an interest in and the power to effectually work for the welfare of the state by reason of the naturalization act, it does

not square with the requirements of a constitutional government to classify them by reason of the conditions thus forced upon them against their will. This is not the fair play demanded by American institutions.

In *State ex rel. Constantini vs. Darwin,* as State Fish Commissioner, 102 Wash. 402, an application for a writ of mandamus was made to compel the defendant to issue a fishing license for the year 1918. The relator was an Austrian, resident in the state since 1913, in which year he declared his intention to become a citizen of the United States. His application for such license had been denied by the Fish Commissioner, because of section 5150-43 of Remington's Annotated Code, which provides:

> "No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not citizen of the United States of the age of eighteen years or over, unless such person had declared his intention to become a citizen and is and has been an actual resident of the state for one year immediately preceding the application for such license. * * * "

And also section 4362 of the 1916 Compiled Statutes of the United States, which provides:

> "No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States is at war,

at the time of his application, shall be admitted to become a citizen of the United States."

The court held that, despite the fact that the relator could not be admitted to citizenship, he was nevertheless entitled to his license. If the law is that as to a *privilege,* an alien is entitled to the same relief as if he were a citizen, it is apparent that an act which denies a *property right* because of alienage, is not only discrimination for the purpose of discrimination, but is invidious discrimination.

Again, a Japanese born in Africa, of Japanese parents, may in good faith declare his intention to become a citizen, and thus be entitled to the same property rights as citizens. There can be no rational difference between such a Japanese and one born in Japan, but such is the effect of the act, and indeed its plain terms. Such a discrimination is invidious, and cannot be upheld.

As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions, by reason of the language in subdivision (a), Section 1, the entire act is invalid.

United States vs. Reese, 92 U. S. 214.
The Trademark cases, 100 U. S. 82.
United States vs. Harris, 106 U. S. 629.

Baldwin vs. Franks, 120 U. S. 678.

James vs. Bowman, 190 U. S. 127.

United States vs. Ju Toy, 198 U. S. 253.

Illinois Central Ry. Co. vs. McKendree, 203 U. S. 514.

Butts vs. Merchants & Miners Transportation Co., 230 U. S. 126.

McFarland vs. American Sugar Refining Co., 241 U. S. 79.

IV.

THE IMPOSSIBILITY OF COMPLIANCE WITH THE ACT UNDER CONSIDERATION BY A JAPANESE, FREES HIM FROM THE OBLIGATION TO COMPLY.

The principle invoked is illustrated in the rules established with respect to conveyances and wills. Where an estate vests, to which is attached the obligation of the performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee or devisee, the estate is freed from the condition.

8 *R. C. L.* 1107, Sec. 167.

28*R. C. L.,* p. 320, Sec. 308.

The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition, and, therefore,

the Japanese is by law freed from the obligation to comply.

Endlich on Interpretation of Statutes, Sec. 441.

"A command which cannot be obeyed is not law. Therefore, possible obedience is an inseparable element in every law without which it cannot exist. So that, though a command should be such as could in general, be carried out, if in a particular instance it becomes impossible, it would not be law for that instance."

Bishop's Non-contract Law, Sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, Sec. 595.

The act under consideration, by requiring Japanese, in order to escape its penalties and forfeiture of their estates, to do the impossible, while requiring of all European aliens only compliance with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In *re Ah Chong,* 2 Fed. 733.

In *re Tiburcio Parrott,* 1 Fed. 481.

V.

THE ACT IS CONTRARY TO ARTICLE I OF THE EXISTING TREATY BETWEEN THE UNITED STATES AND THE EMPIRE OF JAPAN, IN THAT IT PROHIBITS JAPANESE SUBJECTS, RESIDENT IN THE STATE OF WASHINGTON, FROM CARRYING ON THEREIN TRADE, WHOLESALE AND RETAIL, FROM LEASING LAND FOR COMMERCIAL PURPOSES AND FROM DOING THE THINGS NECESSARY OR INCIDENT TO TRADE UPON THE SAME TERMS AS NATIVE CITIZENS OR SUBJECTS.

Violation of the Treaty

The alien Japanese appellant is entitled by the treaty between the United States and Japan, dated February 21, 1911, proclaimed April 5, 1911, United States Statutes at Large, Volume 37, pages 1504-9, to protection against the enforcement of the act of the State of Washington making an invidious discrimination against him and his race because of race, color and place of nativity, not made by the act against other aliens who are "free white persons" or "aliens of African nativity" or "persons of African descent."

It is true that the act does not in words mentions race, color or place of nativity, but the standard prescribed by the act to be complied with in

order to escape the stigma of being "an alien" as defined by the act and the consequent disabilities flowing from such statutory alienage renders it as impossible for Japanese born elsewhere than in Africa to escape such stigma and disability as though the act read, "Alien does not include an alien who has in good faith declared his intention to become a citizen of the United States who is a free white person or an alien of African nativity or a person of African descent, but does include all other aliens."

The act might just as well have been so worded. On its face compliance is optional. As to those of certain races and colors compliance is optional. As to the Japanese, compliance is only not optional but on account of their race, color and place of nativity, is impossible. The question then is whether the treaty between the United States and Japan either in letter or spirit renders invalid the statute of the State of Washington subsequently enacted containing an invidious discrimination against Japanese because of their race, color and place of nativity.

It is not necessary either to assert or establish the proposition that the treaty affirmatively confers upon Japanese the right to acquire or lease prop-

erty in the State of Washington.

It is only necessary to show that the prohibition in the state statute is one which expressly or impliedly violates the letter or spirit of the treaty.

Is it possible to suppose that the Treaty of 1911 would have been entered into by Japan if it had contained a provision that the separate states of the United States should be free to thereafter enact penal laws punishing as a class resident alien Japanese for purchasing or leasing real estate in the state while expressly permitting such purchase or lease by aliens of races, colors and places of nativity other than Japanese?

Interpretation and Consideration of Treaty

The terms of the Treaty of 1894 between the two countries was approaching expiration. The opening sentence of the Treaty of 1911 is significant.

> "The President of the United States of America and His Majesty, the Emperor of Japan, being desirous of strengthening the relations of amity and good understanding which happily exist between the two nations * * * * have resolved to conclude a Treaty of Commerce and Navigation for that purpose."

Nowhere in the treaty is there color for the suggestion that a Japanese alien resident in any state could be subjected to any disability or discrim-

ination to which any other alien would not be subjected. There are only two standards of treatment prescribed:

1. The same treatment "as native citizens or subjects."

2. "Most favored nation treatment in the territories of the other."

The latter standard of treatment governs even the coasting trade, "which is excepted from the provisions of the present treaty" (Article 13).

Is it reasonable then to suppose that where the treaty so carefully protected the citizens and subjects of both the High Contracting Parties by according in certain respects the same treatment as of native citizens and subjects and in certain other respects "most favored nation treatment" it nevertheless did not in spirit and impliedly prohibit the subsequent enactment of a state statute changing the existing law and invidiously discriminating against resident alien Japanese because of their race, color and nativity as compared with other resident aliens of different race, color and place of nativity.

The fact that the control of the emigration of Japanese laborers to the United States was not made a matter of treaty but was left to the honor of the

Empire is sufficient to demonstrate that invidious discrimination against Japanese under state statutes to be enacted in the future were prohibited by a treaty entered into "to strengthen the relations of amity and good understanding which happily exist between the two nations."

Interpretation and Construction of Treaty

Japan, in entering into the treaty was entitled to understand that it prohibited an invidious discrimination against Japanese whereby they were singled out from European and African aliens and subjected to penalties and disabilities to which such other aliens were not subjected when the discrimination was one which the diplomatic history of the United States shows the United States would not have permitted any state or nation to have made against a citizen of the United States.

In March, 1882, the American Legation at Madrid reported overtures by the Liberian Minister, resident at Madrid, looking to a concerted remonstrance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on the condition of depositing one thousand dollars. The Department of State had never had

a case presented where the rights of an American citizen became involved, but the Department of State advised the legation that if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by treaty or recognizable under the amended constitution." International Law Digest, Moore, Volume 4, Section 552.

In 1873 a controversy arose between the United States and Russia. A license had been refused to a Jewish American citizen in Russia. The United States took the position that an American citizen could not be discriminated against because of his religious belief. Mr. Fish, Secretary of State, commenting on Mr. Jewell's presentation of the case, remarked that the withholding of the license from Rosenstrauss "on account, as it is understood, of his being a Hebrew of foreign birth," seemed to be in direct violation of the treaty the purpose of which was to place all citizens of the United States in Russia "on the same footing as native Russians." International Law Digest, Moore, Volume 4, Page 113.

It certainly was not within the contemplation of the parties to the treaty of 1911 that Japanese should be put on a lower footing than that of other

aliens resident in the State of Washington.

In 1885 the United States had a controversy with Turkey in reference to a Hebrew American citizen. International Law Digest, Moore, Section 555, states:

> "In an instruction of August 29, 1885, to the American Minister at Constantinople the Department of State observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most favored nation and for this reason the Minister was to be 'careful to make no untenable demand *as of right.*' Friendship and comity, however, entitle the United States, said Mr. Bayard, 'to ask and expect that no race or class distinction shall be made as regards American citizens abroad.' "

In 1879 a question arose between the United States and Mexico concerning a law of Mexico of 1863, which provided that natural born and naturalized citizens of nations adjoining the Republic could not acquire public lands in the states bordering such nations. The United States took the position that a citizen of the United States was invidiously discriminated against in contravention of the treaty between the United States and Mexico by the law of 1863.

A communication from the United States to Mexico contains the following language:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * * The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens, although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation. It may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.

"It cannot be doubted that if the construction now claimed had been anticipated it would have been thwarted by an explicit provision. There is believed to be no such discrimination against Mexican citizens in any law in this country." International Digest, Moore, Volume 6, Page 702.

The Mexican government did not yield to the

protest of the United States. On the other hand the United States did not withdraw its protest. Was the United States acting in good faith in making its protest to Mexico? Certainly no American would for one moment contemplate the thought that the United States was trying to force a weaker power to yield to a view of the law which the United States believed was unfounded. It must be assumed that the United States in good faith believed that the Mexican law constituted an invidious discrimination against a certain class of citizens of the United States. This controversy with Mexico arose long before the United States and Japan entered into the treaty of 1911. Was Japan justified or not in assuming that an invidious discrimination between Japanese and other aliens resident in one of the states of the United States was not forbidden by the treaty, when the United States in its controversy with Mexico had taken the position that a very much less objectionable discrimination had been made by the Mexican law against a certain class of citizens of the United States. Certainly good faith would have required the United States to have notified Japan that it no longer believed that the protest which the United States had made to Mexico was well founded in law. It is certain that had the United States inserted in the treaty with Japan a

provision that Japanese might be discriminated against so that they would not, under the law of certain states of the United States, have the same privileges as aliens of other nationalities, the treaty would not have been entered into by Japan, and it is equally certain that if it had been contemplated by Japan that the treaty as written permitted such discrimination the treaty either would not have been made or else there would have been a provision inserted in its thwarting such interpretation.

After the Treaty of 1911 had been ratified by the respective countries, the President of the United States proclaimed its ratification in the following language:

> "Now, therefore, be it known, that I, William Howard Taft, President of the United States of America, have caused the said treaty as amended and the said understanding to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

As the opening of the treaty states: It was entered into for the purpose of "strengthening the relations of amity and good understanding which happily existed between the two nations." It is inconceivable that the treaty contemplated the right of a state to enact a law which might cause a breach

of international relations between the two countries when the breach would be brought about by a state of the Union making a discrimination which was more invidious than the discrimination which had been the cause of a protest by the United States to Mexico prior to the enactment of the Treaty of 1911.

How Should a Treaty Be Interpreted or Construed?

"We think, then, that the rights of the parties must be determined by the Treaty but that this particular convention being operative upon both powers and intended for their mutual protection should be interpreted in a spirit of *uberrima fides,* and in a manner to carry out its manifest purposes * * * As treaties are solemn engagements entered into between independent nations for the common advancements of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done, without the sacrifice of individual rights of those principles of personal liberty which lie at the foundation of our jurisprudence."

Tucker vs. Alexandroff, 183 U. S. 424, 437.....

"It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construc-

tion words are to be taken in their ordinary meaning as understood in the public law of nations and not in any artificial or special sense impressed upon them by local law unless such restricted sense is clearly intended, and it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

Geoffrey vs. Riggs, 133 U. S. 258-271.

"Is it necessary in an enlightening age to say that mental reservations cannot be admitted into treaties? This is manifest since by the very nature of the treaty the parties are bound to express themselves in such a manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon mental reservation. What can be the use of such an artifice unless to lull the opposite party into a false security under the vain appearance of a contract?"

Vattel's Law of Nations, p. 284.

Is it for one moment to be supposed that in the Treaty of 1911 the United States expected Japan to understand that it would be permissible for one of the states of the Union to enact a law in the future which would impose upon Japanese subjects resident in such states the disability in purchasing and leasing real estate which was not imposed upon other aliens in the same state? If not, then

the upholding of such a right on the part of the state would be to charge the United States with entertaining the thought of such a mental reservation.

There remains the question of the construction of the terms of the Treaty.

Article I of the said Treaty is as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular

forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

Where a treaty admits of two constructions, one restrictive of rights which may be claimed under it, and the other liberal, the latter is to be preferred.

Shanks vs. Dupont, 3 Pet. 242.

United States vs. Reynes, 9 How. 126.

Hauenstein vs. Lynham, 100 U. S. 473.

Chew Hoeng vs. United States, 112 U. S. 536.

Geoffrey vs. Riggs, 133 U. S. 258.

United States vs. Texas, 162 U. S. 1.

Tucker vs. Alexandroff, 183 U. S. 424.

Sullivan vs. Kidd, 254 U. S. 433.

In re Stixrude's Estate, 58 Wash. 353, the Supreme Court of the State of Washington said:

"This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and Federal, in such cases." In *Geoffrey vs. Riggs, supra,* at page 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be literally constructed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of

nations, and not in any artificial or special sense impressed upon them by local law, unless such retricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Haunstein vs. Lynham,* 100 U. S. 483, 487."

"See also *28 Am. & Eng. Ency. Law* (2d ed.), 490; *Devlin, Treaty Power,* Secs. 116, 125b."

In that case the Supreme Court of Washington held that the words "goods and effects" in Article VI of the Treaty of Amity and Commerce of 1783, as revived by Article XVII of Treaty of Commerce and Navigation of 1827 between Norway and Sweden and United States, permitting the subjects of the contracting parties in the respective states to freely dispose of their goods and effects either by testament, donation, or otherwise, included real as well as personal property, and cited in support of that conclusion the following cases:

Adams vs. Akerlund, 168 Ill. 632.

University vs. Miller, 3 Dev. (N. C.) 188.

1 Bouvier's Law Dictionary (Rawle's Rev.), 635.

Attention may be called to the fact that the Terraces have the right to urge and rely on the provi-

sions of the treaty as fully as their alien complainant.

Buchanan vs. Warley, 245 U. S. 60, 73.

The question then is what is meant by the phrases "commercial purposes" and "incident to or necessary for trade," as used in Article I of the treaty. In order to give effect to all portions of the Article, pursuant to a familiar rule, it is necessary to ascertain what rights have been granted by that portion of the article preceding the quoted phrases. First, express right is given to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail. Giving the word "trade" its most limited meaning, namely, buying and selling commodities, it follows, of course, that the grant of that right includes the right to take and deliver possession thereof, and to pay therefor on purchase and receive and collect the purchase price of the same who sold. Even if the right to resort to the courts and to the remedies provided by law for the enforcement of contracts or the rights accruing on a breach thereof be not implied in the right to carry on trade, it is a constitutional right which the legislature could not deny to the alien. Having the right to buy and take possession, there is implied the right to retain possession during the interim

between purchase and sale. Next, there is an express grant of the right "to own or lease and occupy houses, manufactories, warehouses and shops," which for present purposes, we construe as intended merely for the purpose of carrying on trade, limited as above suggested, and that the right to own or lease so given applies only to the buildings as distinguished from the real estate on which they may be situated. It will be seen from the foregoing that every possible thing necessary for trade, limited as above suggested, is granted in express terms or by necessary implication and that no effect follows the grant of the right "to do anything incident to or necessary for trade" if the term trade be limited as above suggested. Therefore, in order to give effect to all parts of the article, the word trade must be given a broader meaning. Consequently we must consider what was intended to be granted by the right to lease land for commercial purposes, when read in connection with the right to do anything incident to or necessary for trade. Suppose an alien corporation, as defined by the act, should be engaged in an extensive wholesale hardware business, and that it bought from manufacturers all of the articles dealt in, except one small line, which it manufactures itself; suppose, further, it should lease a building with the real estate on which the same was situ-

ated for the purpose of a factory in which to manufacture that one small line of articles. Clearly the manufacture of that limited line of articles would be incident to its wholesale hardware business, and equally clearly would the leasing of the building and real estate be incident to or necessary for its wholesale hardware business, and would be for "commercial purposes." Suppose the number of articles manufactured by it for its wholesale hardware business should be increased; the manufacture and leasing would be equally as clearly necessary for or incidental to trade, and would be for "commercial purposes." No reason appears why it could not increase its manufacture to include the substantial part or all of the articles sold by it in its wholesale hardware business. The same thing would be equally true were the company engaged in wholesale trade in any other commodity or commodities, and it is submitted that, in this respect, there can be no distinction between farm products and any other commodities. In view of the fact that the two terms in question can have no effect unless the term "trade" is given the broader signification which we suggest, it seems perfectly clear that such broader meaning was intended by the parties to the treaty. Clearly the right which we contend under the treaty is not a frivolous claim, and pursuant to the rule laid

down by this Court, that construction of the article urged by us should be adopted.

We call attention to the fact that in the bill of complaint it is alleged that Nakatsuka is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he has produced and desires to produce his products for the purpose of selling them in wholesale and retail trade. If he is prevented from leasing land for the purpose of producing said farm products for such trade, he will be prevented from engaging in trade and the incidents to trade authorized to do under the Treaty. On similar principles those allegations stand admitted by the motion to dismiss. Being engaged in wholesale and retail trade in farm products, it is submitted that producing the said farm products is a commercial purpose and is incident to or necessary for trade therein.

Again, the term trade is not generally given the limited meaning first above suggested. In *Schooner Nymph,* 1 Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

"The word 'trade' is often, and indeed

> generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *May vs. Rice,* 101 U. S. 231, 237, the following appears:

> "The word 'trade,' in the broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, for commerce and traffic 'generally'."

In the case of *Colby vs. Dean,* 70 N. H. 591, the court held that, where the beneficiaries of a will, both male and female, one of whom was a school teacher at the time of making the will, were to take only on condition that they had some useful trade, the shares of those failing to go to those complying with the conditions, the term "trade" was used in the broad sense of occupation or profession, rather than of mechanical employment; and beneficiaries who were bookkeepers, typewriters, and school teachers complied with the condition.

In *Jackson vs. Town of Union,* 82 Conn. 266, it was held that "to trade" is to engage in the purchase or sale of goods, wares and merchandise, and

that a firm engaging in the business of buying standing timber in large quantities and cutting the same, and selling the lumber is engaged in a trading business within Gen. St. 1902, Sec. 2342, providing for the effectment for taxation of the property of any trading business.

In the case of *State vs. North,* 160 N. C. 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends

> "Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or for profit."

In the case of *Smith vs. Cooley,* 65 Cal. 46, the court held that the working of a mine under a bare mining right has uniformly been construed by the courts as a species of trade.

In the case of *Finnegan vs. Knights of Labor Building Ass'n,* 52 Minn. 239, the court, considering a cooperative act permitting the formation of corporations, among other things, "to trade," said:

> "Giving a reasonably liberal meaning to the word 'trade' in the Act, it would include the buying, selling of real estate," * * *

These authorities show that the term "trade" is not always given a narrow meaning, but that its meaning is determined according to the apparent intention of the parties to the instrument in which it is used. As we have shown heretofore, if the limited meaning suggested is given the word, then the phrase "incident to or necessary for trade" is surplusage and creates no right whatever.

Respectfully submitted,

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IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1972

No. [redacted]29

FRANK THOMAS and JEANETTE THOMAS, his wife, dba W. NEAHTUNA,

Appellants,

v.

EDWARD B. THOMPSON, as Attorney General of the State of Washington,

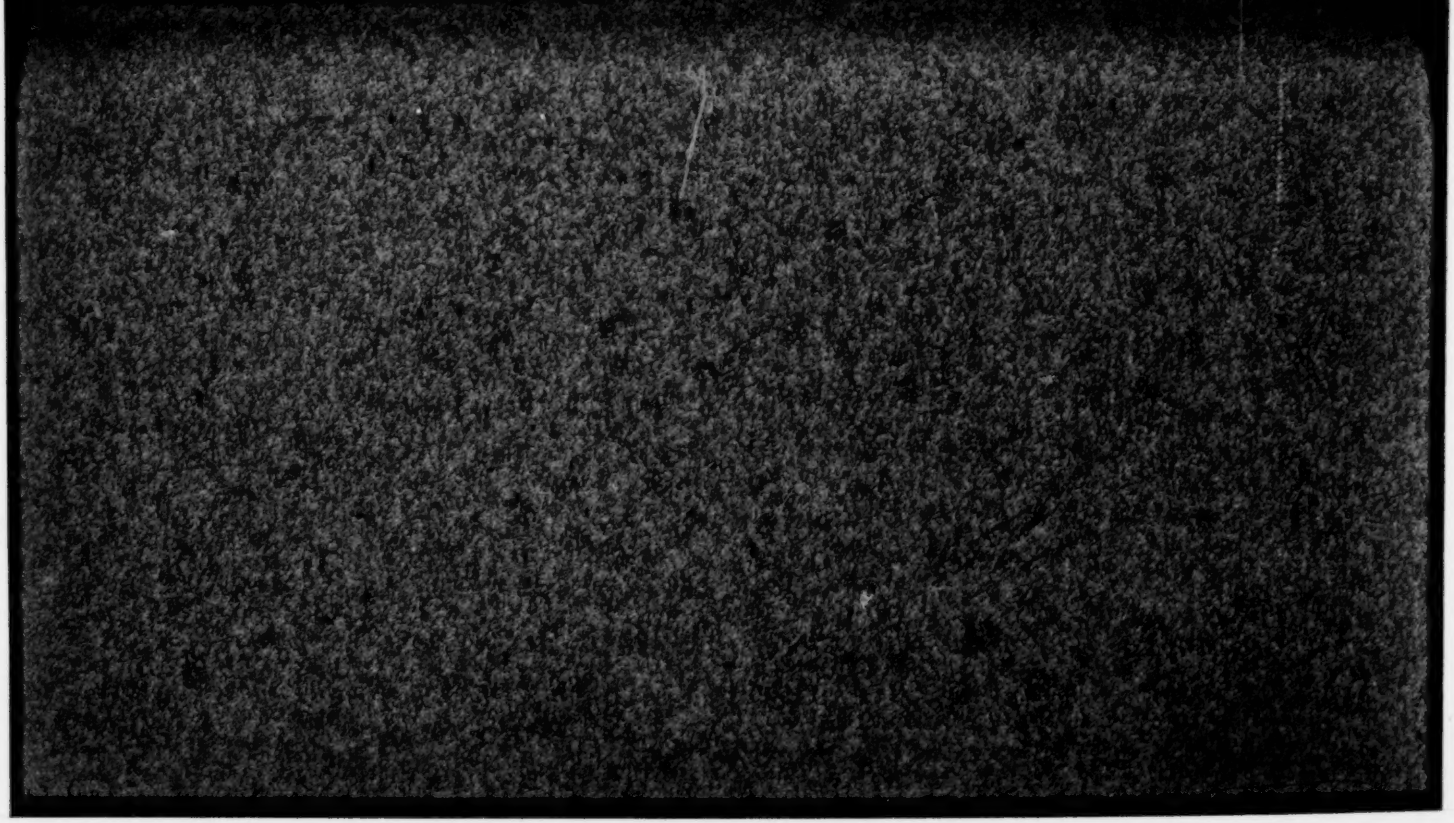
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

EDWARD B. THOMPSON,
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Solicitor for Appellee,

R. W. ANDERSON,
of Counsel.



IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 302.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

v.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

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L. L. THOMPSON,
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INDEX.

		Page
	STATEMENT	7
I.	THE JURISDICTION	9
II.	THE STATE CONSTITUTION	11
III.	DUE PROCESS OF LAW	16
IV.	EQUAL PROTECTION OF THE LAWS	41
V.	THE TREATY	50
	APPENDIX	67

AUTHORITIES CITED.

	Page
Abrams v. State, 45 Wash. 327	12
Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211	52
American Savings Bank & Trust Co. v. Mafridge, 60 Wash. 180	39
Atkin v. Kansas, 191 U. S. 207	35
Atlantic & Pacific Ry. Co. v. Mingus, 165 U. S. 413	28
Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186	52
Barbier v. Connolly, 113 U. S. 27	34
Blackstone's Commentaries, Vol. 1, p. 372	20
Blackstone's Commentaries (Cooley's Ed.), p. 669	31
Blythe v. Hinckley, 180 U. S. 333	28
Boise Artesian Water Co. v. Boise City, 213 U. S. 276	10
C. B. & Q. R. R. Co. v. Ill., 200 U. S. 561	34
Capital Dairy Co. v. Ohio, 183 U. S. 238	54
Cavanaugh v. Looney, 248 U. S. 453	10
Central Lumber Co. v. So. Dak., 226 U. S. 157	21, 34, 48
Chirac v. Chirac, 2 Wheat. 259	27
Clark, State v., 30 Wash. 439	15
Coke Upon Littleton, Bk. 1-2b (Hargrave & Butler Ed.)	19, 20, 30
Congressional Record, 66th Cong. 3d Sess., Vol. 60, p. 4148	65
Corpus Juris, Vol. 2, p. 1048	29
Craig v. Leslie, 3 Wheat. 563	13
Crescent Cotton Oil Co. v. Miss., 66 L. Ed. 55	55
Dalton Adding Machine Co. v. Virginia, 236 U. S. 699	10
DeBecker, Ann. Civil Code of Japan, Vol. I, p. 7	24
Delaware L. & W. Ry. Co. v. Yurkonis, 238 U. S. 439	55
Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611	57
Donaldson v. State, 101 N. E. 485	29
Dorman v. Plowman, 41 Wash. 477	39
Fairfax v. Hunter's Lessee, 7 Cranch. 603	26
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112	25
Freeman v. Dawson, 110 U. S. 264	40
Geoffrey v. Riggs, 133 U. S. 258	29, 52
German Alliance Insurance Co. v. Lewis, 233 U. S. 389	21
Halter v. Nebraska, 205 U. S. 34	21
Hammer v. Dagenhart, 247 U. S. 251	54
Hauenstein v. Lynham, 100 U. S. 483	27
Hoover v. Chambers, 3 Wash. Ter. 235	40
Ide, State v., 35 Wash. 576	14
Insurance Co. v. Haven, 95 U. S. 242	40
International Harvester Co. v. Missouri, 234 U. S. 199	49
Jacobsen v. Mass., 197 U. S. 11	21
Jones v. Jones, 234 U. S. 615	29
Kent's Commentaries, Vol. II, 14th Ed. 53	20

	Page
Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224	49
Kerr, Real Property, 215, et seq	20
Kidd v. Pearson, 128 U. S. 1	53, 55, 57
Knight, In re, 171 Fed. 299	43
Kumagai, In re, 163 Fed. 922	43
Miller v. Wilson, 236 U. S. 373	48
Munn v. Illinois, 94 U. S. 113	33, 35
Mustar v. Russell, 20 Wash. Dec. 199	40
McLean v. Arkansas, 211 U. S. 539	35
Nipges v. Thornton, 206 Pac. 17	15
Noble State Bank v. Haskell, 219 U. S. 104	21
O'Connell, State v., 21 Wash. Dec. 347	12, 13
Orr v. Hodgson, 4 Wheat. 452	27
Otis & Gassman v. Parker, 187 U. S. 606	35
Ozawa, In re, 4 Hawaii Dist. 643	43
Ozawa v. United States, U. S. (not yet reported)	43
Patsone v. Pennsylvania, 232 U. S. 138	47
Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192	21
Quong Ham Wah Co. v. Ind. Comm., 255 U. S. 445	12
Railway Co. v. May, 194 U. S. 267	35
Richards v. Redelsheimer, 36 Wash. 326	39
Ruling Case Law, Vol. 22, p. 83	29
Saito, In re, 62 Fed. 126	43
Sedgewick, Trial of Title, 226	20
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481	10
Spreitzer v. Miller, 98 Wash. 601	40
Standard Oil Co. v. Graves, 249 U. S. 389	38
Stephen's Commentaries on Law of England, Vol. I, p. 330	20
Stimson's American St. Law, Vol. I, 6013	20
Sullivan v. Kidd, 254 U. S. 433	29, 59
Tanner v. Little, 240 U. S. 269	10
Taylor v. Benham, 5 Howard 232	28
Texas and P. Ry. Co. v. Rigby, 241 U. S. 33	52
Tibbals v. Iffland, 10 Wash. 451	38
Tiffany, Real Property, 2350	20
Truax v. Raich, 239 U. S. 33	17, 28, 35, 45, 46
United States v. Knight, 156 U. S. 1	54
United States v. Repentigny, 72 U. S. 211	28
Vattel, Law of Nations (Chitty's Ed.) 177	29
Washburn, Vol. I, Real Property, 131	20
Watkins v. Balch, 41 Wash. 310	39
Wheaton on International Law, 5th Ed	22, 29
Winston, State ex rel., v. Hudson Land Co., 19 Wash. 35	11
Winston, State ex rel., v. Morrison, 18 Wash. 664	11
Yick Wo v. Hopkins, 118 U. S. 356	45
Young, In re, 195 Fed. 645	43
Young, Ex Parte, 209 U. S. 123	10

STATUTES CITED.

	Page
Arizona, Chapter 29, Laws of 1921	23
California, Chapter 113, Laws of 1913	22
California Initiative Measure No. 2	22
Colorado, Laws of 1921, p. 172	23
Delaware, Chapter 188, Laws of 1921	23
Illinois, Cahill's Revised Statutes, 1921, Chapter 6	23
Indiana, 2 Burn's Statutes, 1914, secs. 3943-44	23
Louisiana, Substitute Ordinance No. 452	23
Nebraska, Section 5687, Compiled Statutes	23
Nevada, Laws of 1920-21, page 416	23
New Mexico, Joint Resolution of Legislature, November 9, 1921	23
Texas, Chapter 134, Laws of 1921	23
Treaty of Commerce & Navigation with Japan, 37 Stat. 1504	50
United States, Section 4530 U. S. Comp. Stat., 1916	23
United States, Section 2169, Revised Statutes	42, 43
United States, Section 2289, Revised Statutes	23
United States, 1 Stat. 103	43
United States, 16 Stat. 254	43
United States, 18 Stat. 316	42
United States, 29 Stat. 618	24
United States, 31 Stat. 154	24
Washington, Chapter 50, Laws of 1921	8, 23
Washington, Section 1, Article I of the State Constitution	9
Washington, Section 33, Article II of the State Constitution	11, 14, 15, 16
Washington, Section 5918, Rem. 1915 Codes & Statutes	39
Washington, Section 8745, Rem. 1915 Codes & Statutes	38, 39
Washington, Section 8775, Rem. 1915 Codes & Statutes	16

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BRIEF OF APPELLEE

STATEMENT.

The detailed facts in this action are correctly stated by appellants, and a repetition thereof would be superfluous. Stated concretely, the abstract

question is whether the state of Washington may constitutionally prohibit the leasing of a tract of land to an alien Japanese for a term of five years, the lessee proposing to use the land for the purpose of raising agricultural products, such products to be sold by him, both at wholesale and retail, and also shipped in commerce, intrastate, interstate and foreign. The statute (ch. 50, L. of Washington 1921), which is set forth as an appendix to this brief, in addition to prohibiting the alien ownership of real property, likewise prohibits the acquiring of any right or benefit to the use, enjoyment, rents, issues or profits thereof, which would perhaps include the transfer of interests which would technically not constitute a leasehold interest. Section 11 of the act, however, provides:

"If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional."

Since it does not appear that appellants propose to do anything concerning which the statute is material other than to execute an agricultural lease, the present inquiry is properly restricted to that situation and cannot extend to other questions which might possibly arise under the broad terms of the act.

ARGUMENT.

I.

The Jurisdiction.

It may well be doubted whether the allegations of the bill sufficiently show any justification for equitable relief, even if the statute be considered unconstitutional. The case involves but a single proposed transaction between the appellants, Frank and Elizabeth Terrace and N. Nakatsuka. So far as civil proceedings are concerned, the only remedy which the state has after the lease is executed is to bring an escheat proceeding. That proceeding would finally test and determine the validity of the act in the state courts, with the right of a writ of error to this court. In so far as any possibly criminal features are concerned, the only actions which could be instituted would be under section 7 of the act. This would make the appellants Terrace liable to criminal prosecution should they make the conveyance, but would not make the appellant Nakatsuka liable unless he should fail to disclose the fact that he holds such an interest to the prosecuting attorney or the attorney general under the provisions of subdivision (c) of section 7. An acquittal in a criminal proceeding would bar further prosecutions, because the offense is not a continuing one, and section 1 of Article I of the State Constitution of Washington provides that no person shall be twice put in

jeopardy for the same offense. Appellants do not sue in behalf of others similarly situated; neither does the case involve interference with a series of acts necessary to the conduct of a business, and therefore present a case for the intervention of equity to prevent multiplicity of actions. It simply involves the right of the state to prevent an isolated transaction, the legality of which may be finally determined in the state courts. It is submitted, therefore, that there is no jurisdiction in equity under the following decisions of this court:

Boise Artesion Water Co. v. Boise City, 213 U. S. 276;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;
Dalton Adding Machine Co. v. Virginia, 236 U. S. 699;
Cavanaugh v. Looney, 248 U. S. 453.

Neither can the jurisdiction be sustained on account of the severity of the penalty, under the rule announced in *Ex Parte Young*, 209 U. S. 123. The penalty in this case is the same as that prescribed in the trading stamp act of Washington, which was sustained by this court in *Tanner v. Little*, 240 U. S. 269. In effect, this is merely a test suit to obtain the opinion of this court upon an abstract question of law. There is a complete and ample remedy to the appellants in the state courts, and no necessity for the exercise of equity jurisdiction.

II.

The State Constitution.

It is contended that under the provisions of section 33, Article II of the Constitution of Washington, the state has no power to prohibit leases of this character. Section 33, Article II of that instrument provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

This section was held by the supreme court of Washington to prohibit a lease of realty to an alien for ninety-nine years (*State ex rel. Winston v. Morrison,* 18 Wash. 664), and also one for forty-nine years (*State ex rel. Winston v. Hudson Land Co.,* 19 Wash. 35). In the first case the Washington court, more or less by way of dictum, said that "a lease of lands in this state to an alien for a reasonable term might be upheld." There is no reported case,

however, in which the Washington court has indicated the line of demarkation between a lease for a reasonable term which *might* be upheld, and one for an unreasonable term which will be held void. Neither has that court ever held that the legislature of Washington has no power to impose limitations upon the right of aliens to hold real property more restrictive than those contained in section 33 of Article II of the State Constitution. Appellants quote at length from the case of *Abrams v. State,* 45 Wash. 327, in which case the court merely held that the constitution did not prohibit an alien from acquiring an estate in fee simple by inheritance, a question obviously not material to the present contention.

The contention involves the construction and application of the Constitution of Washington. This court, therefore, is bound to accept the construction adopted by the highest court of that state as to the effect of this constitutional provision, whatever may be its own views with respect to the correctness of the conclusion reached.

Quong Ham Wah Co. v. Ind. Comm., 255 U. S. 445-448, and cases cited therein.

The supreme court of Washington, upon October 22, 1922, in the case of *State v. O'Connell,* sustained this act as not in conflict with either the State or the Federal Constitutions. The decision has not been officially reported, and for that reason we are printing the opinion as an appendix to this brief.

The *O'Connell* case involved the validity of a trust agreement by the terms of which certain land was deeded to two citizens of the state of Washington under a trust agreement which directed the trustees within twenty years to sell the land and distribute the proceeds in equal shares to a citizen and an alien beneficiary. It was argued in support of this agreement that its effect was to work an equitable conversion of the land into money under the doctrine announced by this court in the case of *Craig v. Leslie,* 3 Wheaton 563, and that consequently it was not a conveyance of real property under the Constitution, nor of an interest therein under the statute. The Washington court held the act applicable, even though it be conceded that an equitable conversion was worked. Referring to the Constitution, it said:

"Our constitution provides that 'the ownership of lands by aliens * * * is prohibited in this state * * *.' It was entirely within the province of the state legislature to determine by legislation what are lands, and when one becomes an owner thereof, within the meaning of the constitutional provision. In so doing, it has declared that 'land' 'does not include lands containing valuable mineral deposits,' etc., 'but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof * * *' and it has said that ownership includes 'the right to any benefit of' lands."

In other words, the Washington court has held that the legislature of Washington may legally declare that the Constitution includes the right to any

benefit from realty. Obviously, it cannot be contended that the lessee does not possess such a right.

However, even if the question be considered as an original one, the same conclusion must follow. The only thing which section 33 of Article II, *supra*, does, is to prohibit the alien ownership of real property except in certain cases. Constitutional limitations upon legislative power are not to be implied. The only limitation which section 33 creates is the limitation that the legislature shall never thereafter permit the alien ownership of realty, except in the instances expressly described. The language of the section is prohibitory, and under ordinary rules of constitutional construction there is nothing upon its face which indicates an intent to prohibit the ordinary exercise of legislative power in cases not covered by the express prohibitions of the Constitution. In an attempt to meet this obvious conclusion, appellants argue "that the Washington Constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction in a large part, to the legislature to take affirmative action." This argument is ingenious, but the difficulty with it is that it is not in accord with the announced views of the supreme court of Washington, which is the final arbiter of the question. The best statement by that court is found in *State v. Ide,* 35 Wash. 576-584, where that court, in affirming the power of the legislature to impose a poll tax without express constitutional authority, said:

"Our constitution does not expressly mention such taxation, and, *as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument,* it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited from authorizing it to be levied by some provision of the constitution." (Italics ours.)

This quotation is set forth by the same court and approved in the recent case of *Nipges v. Thornton,* 206 Pac. 17, decided on April 8, 1922, where a similar conclusion upon similar facts was reached. See also *State v. Clark,* 30 Wash. 439-441.

The suggestion is also made that since the common law prohibits the alien ownership of real estate, section 33 is a nullity unless it be considered as abrogating the common law in instances not covered by express prohibitions contained therein.

The fallacy of this suggestion is apparent. Common law rules are observed by the courts in the absence of legislative action, and are subject to modification or complete abrogation by the legislative power. Without section 33, it would have been competent for the legislature of Washington to have entirely abrogated the common law relating to the alien ownership of realty by permitting such ownership. Section 33 prevented such action to the extent indicated, but it neither abrogated nor modified the common law nor curbed the legislative power except as it might thereafter seek to liberalize the common law in certain particulars.

The reason for the amendment will be found in an historical consideration of the situation which existed when the Constitution of Washington was adopted. Section 8775, Rem. 1915 Code of Washington, provides:

"Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in like manner and with like effect as if such alien were a citizen of this state or of the United States."

This section was originally passed by the Territorial Assembly of Washington in 1864. Its effect as to aliens capable of becoming citizens was to entirely abrogate the common law in advance of naturalization. Section 33, *supra,* was evidently passed with the express purpose of repealing this section, in part, and not with the purpose of perpetuating the part left unrepealed as a part of the organic law of Washington.

III.

Due Process of Law.

It is argued by appellants that this transaction cannot be prohibited under the due process clause of the Federal Constitution.

This argument assumes the case to be determined entirely by the general rules which obtain in ordinary

police power cases. Even though that assumption be accepted, we think the legislative action under consideration is sustainable. Appellant's argument is based upon a supposed analogy between the situation of an alien who labors for wages in an ordinary occupation and one who, under a lease, obtains full dominion and control over a piece of realty for a limited period of time. It is said that if the right to engage in an ordinary gainful occupation cannot be denied to an alien, as was held in *Truax v. Raich,* 239 U. S. 33, that therefore he must also have a constitutional right to take a lease of land, since the taking of such a lease might be the means by which an alien gains his livelihood. This contention is elaborated by a number of imaginary situations in which aliens might desire to make arrangements of different kinds to work for farmers under various conditions of employment somewhat analogous in principle to the ordinary contract between master and servant.

The vice of the argument is two-fold: (1), it fails to distinguish between the particular thing here involved and the average occupation in which an alien might desire to engage, and (2), it is based upon too broad a conception of the scope of the due process clause with reference to aliens as applied in the *Truax* case, *supra.* That opinion clearly recognizes the fact that there are limitations upon the rule, and that where there is some relation between the public welfare and a special restriction sought to

be imposed upon an alien, the rule will not apply. The decision very carefully limits the effect of the rule. After referring to the decisions of the courts relating to the distribution of national resources in which special restrictions as to aliens had been sustained, Mr. Justice Hughes continued:

"The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham,* 100 U. S. 483; *Blythe v. Hinckley,* 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of *ordinary* private enterprise." (Italics ours.)

It will be observed that cases relating to the devolution of real property are expressly exempted and also that the court restricts the decision to the conduct of *ordinary* private enterprises. The same restriction appears upon page 41 of the decision, where it is said that the authority of the state to enact police power measures does not make it possible for the state to deny to aliens "the *ordinary* means of earning a livelihood." (Italics ours.) Again, the reservation is noted that there may be means of livelihood denied to aliens which citizens are permitted to follow. The thought is again repeated in the last paragraph of the opinion where it is said:

"No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates *to every sort.*" (Italics ours.)

The validity of the particular restriction now before the court therefore, if the act be considered as an ordinary police power measure, depends upon its relation to the public welfare and is not determined by any announced conclusions of this court with respect to the rights of aliens to follow other and different occupations. Concretely, the question is whether the court can say that the public welfare may not be injuriously affected by the leasing of real property to persons who owe to the state and nation no obligations of allegiance. Unless it can do so, this statute, in so far as this action is concerned, must be sustained.

Unlike many exercises of the police power, this prohibition is not the result of new and heretofore unknown economic or industrial conditions concerning which the court is compelled to judge by the exercise of its judicial knowledge, unaided by judicial precedent. While the common law cannot justify the denial of a constitutional right, the fact that both the common law and the statute are in accord affords a cognate reason why the statute should be sustained where the alleged constitutional prohibition is not specific.

The public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception. Lord Coke, in Book 1-2b

of Coke Upon Littleton (Hargrave & Butler Ed.), states the rule as follows:

"If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone has the following to say with respect to the same subject:

"An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences." 1 Blackstone's Commentaries, p. 372.

See also:

2 Kent's Comm. 14th Ed. 53-64;
Kerr, Real Property, 215 *et. seq.;*
Tiffany, Real Property, 2350;
1 Stimson's Am. St. Law, 6013;
Stephens Comm. on Law of England, Vol. 1, p. 330-376;
Sedgewick, Trial of Title, 226;
1 Washburn, Real Property, 131.

In the case of *Halter v. Nebraska,* 205 U. S. 34-39, this court said:

"The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States."

Similarly in *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192-204, it was said:

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction" (Citing authorities.) "We cannot say that there is no basis for this widespread conviction."

See also:

German Alliance Insurance Co. v. Lewis, 233 U. S. 389;

Central Lumber Co. v. So. Dakota, 226 U. S. 157-160;

Noble State Bank v. Haskell, 219 U. S. 104;

Jacobsen v. Mass., 197 U. S. 11-34.

The application of this rule to the question of the desirability of allowing aliens to possess dominion over the soil will show that the preponderant public opinion of the county has always been opposed to this and that this opinion has been particularly intensified in recent years. At an early period in our

history when there was a large amount of vacant public domain, there appears to have been a difference of legislative opinion with respect to the wisdom of imposing special restrictions upon aliens in this regard. According to a note appended to the Fifth Edition of Wheaton on International Law, page 138, in 1873, Ohio, Michigan and Illinois imposed no such restrictions; Vermont, North and South Carolina required residence and the taking of the oath of allegiance, while in Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana and Missouri the filing of a declaration of intention was required before title to realty could be held by an alien. The other states appear to have been content to follow the common law which, as we have already shown, prohibited alien ownership. In recent years, however, many states have by express statutory or constitutional enactment, expressly imposed these restrictions. We have already adverted to the Constitution of Washington which was adopted in 1889. In 1913, California adopted chapter 113, Laws of 1913, which prohibited ownership but permitted leases for terms of three years. This appears to have been found insufficient by the people of California, and consequently, in 1920, Initiative Measure No. 2, was adopted by a popular vote of 668,483 in favor of the measure, and 222,086 opposed thereto. An illustration of the trend of the times is found on an examination of the action taken by the various states in the year 1921. In that year the states of Wash-

ington, Arizona, Delaware and Texas all enacted laws relating to this same general subject. Chapter 50, Laws of Washington of 1921; Chapter 29, Laws of Arizona of 1921; Chapter 188, Laws of Delaware of 1921; Chapter 134, General Laws of Texas of 1921.

In addition to this, during that year preliminary steps were taken to submit to the people of Colorado, Louisiana, Nevada and New Mexico the question of whether constitutional amendments should not be adopted to place aliens under disabilities similar to those imposed by chapter 50, *supra.* Laws of Colorado for 1921, p. 172; Substitute Ordinance No. 452 of Louisiana, approved by the Constitutional Convention of 1921; Laws of Nevada, 1920-21, p. 416; Joint Resolution of New Mexico Legislature of November 9, 1921. The following states by statute have also adopted the rule of the common law to a more or less extent: Illinois, Cahill's Revised Statutes 1921, chapter 6; Indiana, 2 Burns' Statutes 1914, sections 3943-44; Nebraska, section 5687, Compiled Statutes.

Congress has also recognized the necessity for some regulation, although not to as great an extent as have the states. Section 2289 of the Revised Statutes, since its original enactment in the Act of May 20, 1862 (sec. 4530, U. S. Comp. Stat. 1916) has always limited the right to appropriate the unoccupied public domain to citizens or to persons who have filed declarations of intention to become such.

The Act of March 2, 1897 (29 Stat. 618), relating to the ownership of land in the territories, permitted bona fide resident aliens to hold realty, but prohibited its ownership by all other aliens, and further provided that the removal of a resident alien should subject his realty to escheat by the Government if not sold within ten years after the date of such removal.

The Act of April 30, 1900 (31 Stat. 154), providing for the organization of the Government of the Territory of Hawaii, prohibited the conveyance of any interest in realty in the public domain of Hawaii to aliens who had not filed declarations of intention.

It might be noted in this connection that according to Mr. J. E. DeBecker, an authority quite widely known, in his "Annotated Civil Code of Japan," Volume 1, pages 7, 238 and 242, aliens are not permitted to own real property in Japan, and neither are they permitted to lease for agricultural purposes, although Mr. DeBecker adds that an imperfect act modifying the restrictions was recently passed by the Japanese Parliament, but has not been promulgated by the Emperor.

This course of legislation indicates a uniform popular view that the public welfare is directly affected by the alien ownership of realty. It is particularly noteworthy that the most drastic action in this regard has been taken by those states in which there are found large bodies of aliens who are not permitted by Congress to become naturalized. Pre-

sumably, this legislation is the result of experience and of a more intimate knowledge of local conditions than the court can obtain by the exercise of its judicial knowledge. The language of this court, in the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112-160, while addressed to a different question, seems to be peculiarly applicable to a consideration of the view announced by the people of California when they voted upon the initiative measure heretofore referred to. In that case this court said:

"The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of lands than can anyone who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question."

While this court does not appear to have even expressly considered the question of whether the Fourteenth Amendment abrogates the common law rule, it has consistently recognized the existence of the power of the various states in a considerable number of cases, a procedure necessarily inconsistent with the view that the Constitution in any way oper-

ates to curb the state police power upon the subject. The leading case is curiously the first case. We refer to the decision in *Fairfax v. Hunter's Lessee,* 7 Cranch. 603. In that case it was held that a devise made to an alien was good until office found by the state. The court, however, in an elaborate opinion, approved the proposition that an alien could take neither by a devise, inheritance or purchase against the sovereign power. We quote from page 619:

"It is clear by the common law, that an alien can take lands by purchase, though not by descent; or in other words he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. 11 Hen. 4, 26, 14, Hen. 4, 20. Co. Litt. 2 b. Nor is there any distinction whether the purchase be by grant or by devise. In either case the estate vests in the alien. Pow. Dev. 316, etc. Park. Rep. 144. Co. Litt. 2 b, not for his own benefit, but for the benefit of the State; or in the language of the ancient law, the alien has the capacity to take, but not hold lands, and they may be seized into the hands of the sovereign. 11 H. 4, 26. 14 H. 4, 20. But until the lands are so seized, the alien has complete dominion over the same. He is a good tenant of the freehold in a precipe on a common recovery. Goldsb. 102. 10 Mod. 128. And may convey the same to a purchaser. Sheafe v. O'Neile, 1 Mass. Rep. 256. Though Co. Litt. 52 b. seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will divest. It seems indeed to have been held, that an alien cannot maintain a real action for the recovery of lands. Co. Lit. 129 b. Thel. Dig. ch. 6. Dyer, 2 b. but it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign."

Although this case was decided before the adoption of the 14th amendment, it was cited several times with express approval after 1870, as will hereafter appear.

In *Chirac v. Chirac,* 2 Wheat. 259, decided in 1817, this court held that a treaty with France gave an alien the right to inherit certain real property, but at the same time it accepted without dissent, the point made by the plaintiff in error that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States."

In *Orr v. Hodgson,* 4 Wheat. 452-463, it was held that the heirs of an alien could not inherit real property in the absence of treaty provisions by reasons of the common law.

In *Hauenstein v. Lynham,* 100 U. S. 483, the question was re-examined and the *Fairfax* case, *supra,* expressly affirmed in the following language:

"The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. 2 Tucker's Blackst. App., Note C. By that law 'aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' 2 Bla. Com. 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, *but such title is always liable to be devested at the pleasure of the sovereign by office found.* In such cases the sovereign, until entitled by office found or its equivalent, cannot pass

the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch. 603.

"The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily in the States where the property is situated." (Italics ours.)

In *Atlantic & Pacific Ry. Co. v. Mingus,* 165 U. S. 413-432, the *Fairfax* case was cited as sustaining the power of the sovereign by legislative act to declare a forfeiture instead of by the common law procedure of office found. The same conclusion was reached in *Taylor v. Benham,* 5 Howard 232-270. Likewise in *United States v. Repentigny,* 72 U. S. 211, it was stated that Congress might, by a general act, divest aliens of any rights which they might have in real property instead of requiring judicial proceedings. We quote from page 268:

"A legislative act, directing the possession and appropriation of land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government without these preliminary proceedings. *Fairfax v. Hunter,* 7 Cranch. 603."

In *Blythe v. Hinckley,* 180 U. S. 333, the same doctrine was announced. In *Truax v. Raich,* 239 U. S. 33, this court, in declaring unconstitutional an

Arizona law prohibiting the employment of aliens at the same time observed that the case was not within the decisions relating to the devolution of real property, and finally in the case of *Sullivan v. Kidd,* 254 U. S. 433, it was said:

"Primarily the devolution of the estate, it being situated in the state of Kansas, would be determined by the laws of that state."

See also:

Geoffrey v. Riggs, 133 U. S. 258;
Donaldson v. State, 101 N. E. 485;
22 R. C. L. 83;
2 C. J. 1048;
Jones v. Jones, 234 U. S. 615.

The common law rule was likewise in accord with the law of nations as recognized by all civilized countries. In Wheaton's International Law, 5th Ed., page 132, the author quotes the following from Foelix, Droit International Prive, section 9:

"Every state possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted, and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them * * *."

Vattel, in his Law of Nations (Chitty's Edition), at page 177, thus states the rule:

"Every state has the liberty of granting or refusing to foreigners the power of possession *lands* or other immovable property within her territory. (117) If she grants them that privilege, all such

property possessed by aliens remains subject to the jurisdiction and laws of the country, and to the same taxes as other property of the same kind. The authority of the sovereign extends over the whole territory; and it would be absurd to except some parts of it, on account of their being possessed by foreigners. If the sovereign does not permit aliens to possess immovable property, nobody has a right to complaint of such prohibition; for, he may have very good reasons for acting in this manner: and, as foreigners cannot claim any right in his territories (sec. 79), they ought not to take it amiss that he makes use of his power and of his rights in the manner which he thinks most for the advantage of the state. And, as the sovereign may refuse to foreigners the privilege of possession immovable property, he is doubtless at liberty to forbear granting it except with certain conditions annexed."

While it is true that none of these cases specifically cover leases, nevertheless the distinction seems to be immaterial. The cases are premised upon the rule of the common law. That rule is stated in Book 1-2b. of Coke Upon Littleton, as follows:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it (6). But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as

necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

Blackstone reaches the same conclusion in this language:

"For he may purchase anything; but after purchase he can hold nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when bound by an inquest of office) being immediately forfeited to the king." (I Blackstone's Commentaries, Cooley's Ed., p. 669).

It seems apparent that if the power to prohibit the holding of the fee simple title by an alien rests in the police power, then the same rule would, of course, apply to leases, because a lease does not differ from a conveyance in fee except in the length of tenure and the power of disposition.

Aside from precedent, however, the reasons for the restriction are not difficult to suppose. Some of them were well stated by the trial court, where it said:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or

own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged.

"This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-neckedman,' or 'freeman,' was synonymous with 'freeholder.' They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, Book 1, Chap. 1, subhead 'The Land.') The recognition of this principle has run throughout the history of our race and its governments." (Record, 21.)

Substantially, all human activities are carried on upon the earth, and since, in the language of Vattel "nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength," the same thing may be said of states. The prosperity of the state, however, cannot rest entirely upon obligations imposed by criminal statutes or mandatory legislative commands, but must also rest upon moral and unwritten obligations which are the incidents of citizenship and national allegiance. The possession of the soil by persons who recognize no such obligations but who are bound

only by specific statutory mandates, and even as to some of these, the rules of international law relieve them, thus has a direct and obvious relation to the public welfare. This must be so because the welfare of the state directly depends upon the way in which the land from which it draws its very existence, is used. The importance of this is more marked in a nation whose governmental power is restricted by constitutional limitations than in an autocratic community, because in such a nation the possession of the soil by the individual carries with it the certain rights of immunity from governmental action which can be claimed to the possible detriment of the state. The fact that there is no relation betweer the employment of aliens in ordinary transitory occupations and the public welfare by no means compels the same conclusion where there is involved sovereignty over the soil, a thing upon which our political existence may well depend. The contention that because the situations have a surface similarity and that therefore the Fourteenth Amendment operates in the same degree in both instances, is simply another one of the oft-repeated attempts to define and limit the police power by specific definition and limitation. This court has always consistently refused to do this, since its decision in *Munn v. Illinois,* 94 U. S. 113, but has always decided each case upon its own particular facts.

Neither has it restricted the police power to emergency regulations, such as health measures, but

it has extended it to include measures designed to subserve the public welfare and prosperity.

Barbier v. Connolly, 113 U. S. 27;
C. B. & Q. R. R. Co. v. Ill., 200 U. S. 561;
Central Lumber Co. v. So. Dak., 226 U. S. 157.

The intimate relation between the ownership of soil and the public welfare and prosperity of the people of the state is not hard to see. The entire political and economic fabric of the state is finally dependent upon the soil, and particularly that portion which is used for agriculture, which is the question herein involved. The ownership of large parcels of realty by aliens may be dangerous to the public welfare of a state for many possible reasons. Some of them may be suggested:

1. It diverts from local use and local enjoyment a large part of the net revenues of the land which would otherwise accrue to the benefit of the people of the state and future generations;

2. It promotes racial dissention and thereby menaces the public safety;

3. It permits the land upon which the state depends to be used in such a manner as to impair its use for future generations, because presumably the alien tenant or proprietor has no interest in the perpetuity of the state;

4. It exposes the citizen owners of land to competition which they are often unable to meet, to the consequent detriment of the state, since the true pros-

perity of the state always depends upon the prosperity of its citizens;

5. It places the consuming public at the mercy of alien races who are apt in times of international disturbance to return to the country of their origin and thus interrupt and paralyze the entire industrial and social life of the state; and

6. It may well deprive the state of important and necessary aid and assistance in time of war.

It is not necessary for the court to conclude that all or any of these things will actually occur if restrictions are not imposed. Unless it can see that some or all of them may not, in fact occur, the legislative action must be sustained, because the legislature, and not the court, is the judge of the necessity of regulation under the police power unless the court can judicially know that there could, under no possibility, be any occasion for that exercise.

Munn v. Illinois, 94 U. S. 113-132;
Otis & Gassman v. Parker, 187 U. S. 606-609;
Atkin v. Kansas, 191 U. S. 207-222;
Railway Co. v. May, 194 U. S. 267-269;
McLean v. Arkansas, 211 U. S. 539-548.

It will probably be said in response to this that some of these reasons, such as the economic competition of foreign labor, might have been urged in support of the act declared invalid in *Truax v. Raich, supra.* We think that possibility would not dispose of the question. Once within our borders, an alien cannot be deprived of the right to live, and to live he

must labor or be supported by the charity of others. An interference with that right under the police power is, therefore, subject to certain limitations, the exact nature of which need not be specifically designated. The Arizona statute applied to all occupations, irrespective of their nature. The practical effect of this, as was pointed out in the opinion, was to exclude aliens from the state, a subject entrusted to Congress. The opinion did not hold that within certain limits the police power might not be exerted for the purpose of protecting the citizens of a state from the economic competition of races who have a standard of living inconsistent with American ideals, or to conserve our natural resources for our descendants. Obviously, such a conclusion would be difficult to reconcile with the oft-repeated statement of this court that the police power extends to the promotion of the general public welfare and prosperity.

Neither is the possible effect of such a condition restricted to the persons with whom the alien may come in competition. The so-called Japanese problem illustrates this quite fully. We need quote no authority to the point that in the field of agriculture the American and the Oriental cannot compete. This is so because their standards of living are incomparably different. The Oriental works his wife and his family in the fields practically during the hours of daylight, and his standard of living could not be adopted by an American. The possible result of such a condition would be that in the course of time, in

certain sections of the country, at least, all lands might pass into the hands of these classes of aliens. The people of the state would then be entirely dependent for their very existence upon alien races who recognize to the state or nation no other obligations than those forcibly imposed. A change in a foreign government; a war in distant portions of the earth, and these people—as some of them have in fact done since the last war—would return to the country of their origin. The disastrous effect upon the whole economic fabric of a state of such a possibility is not hard to foresee. This possibility is in addition to the equally detrimental effect of driving American farmers from the occupations to which they have been accustomed into other and different businesses. Surely these are possibilities which the Fourteenth Amendment does not prohibit the state from guarding against.

Appellants do not directly controvert the foregoing, but seek to avoid its effect by a considerable discussion of the question of whether, under the laws of Washington, a lease creates an interest in real estate, contending that it does not. We are unable to see the materiality of this discussion. If the case is to be determined in the light of the police power cases, then the statute must stand or fall, as the court may determine its necessity with respect to the public welfare. In such event it can make no difference whether a lease be viewed as an interest in realty or as personal property, any more than the legality of a

tax, claimed to constitute a burden upon interstate commerce, is determined by the view of a state court with respect to its being an excise tax or a tax on property.

Standard Oil Co. v. Graves, 249 U. S. 389, 394.

In so far as the Federal Constitution is concerned, the law is tested by what is done and not by what the local law may regard it for other purposes.

In any event, however, appellants are mistaken in their view of the nature of a lease of realty under the laws of Washington, because such leases have always been regarded in that state as constituting the conveyance of an interest in land. Appellants' position is predicated upon the case of *Tibbals v. Iffland,* 10 Wash. 451, in which case it was held that under the community property law of Washington a wife does not have to join in an *assignment* of a lease of a store room. In reaching the conclusion which it did, the Washington court distinguished between an assignment of a lease and the making of such a lease, because at page 455 of the opinion it said:

"Leases of real estate for more than one year, *being incumbrances upon the property demised,* must, under our statutes, be created by deed and with the usual formalities of deeds." (Italics ours.)

There are two factors by which we may determine the nature of a lease in Washington: (1) the statute of frauds, and (2) the application of the rule of community property. Section 8745, Rem. 1915 Code, provides:

"All conveyances of real estate or *of any interest therein,* and all contracts creating or evidencing any incumbrance upon real estate shall be by deed."

Section 5918, Rem. 1915 Code, provides, in part:

"The husband * * * shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife."

Construing section 8745, *supra,* the Washington court has consistently held that a lease, being an incumbrance on real estate, is within the statute.

In *Richards v. Redelsheimer,* 36 Wash. 325, this conclusion was reached in the following language:

"It is apparent, from the provisions of section 4517 (8745), that the common law has been modified to the extent of providing that all conveyances of real estate, or of any interest therein, or contract evidencing any incumbrance thereon, shall be by deed."

See also:

Watkins v. Balch, 41 Wash. 310;
Dorman v. Plowman, 41 Wash. 477.

In *American Savings Bank & Trust Co. v. Mafridge,* 60 Wash. 180, it was held that a contract for a lease was within the statute, but that an assignment of the lease was not so included. From these decisions it is apparent that the *Tibbals* case was not decided upon the theory that a lease does not create

an interest in real property, but simply upon the peculiar provisions of the statute relating to community property.

In *Hoover v. Chambers,* 3 Wash. Ter. 235, a lease on land was held to constitute an incumbrance within the meaning of the community property statute, and that therefore a contract by a married man to make a lease upon community real estate without the joinder of his wife, was invalid. This question was again considered in *Spreitzer v. Miller,* 98 Wash. 601, in which case it was held that where the wife fails to join in the execution of a lease, the lease cannot be sustained. The same view was announced in *Mustar v. Russell,* 20 Wash. Dec. 199-203, in which it was said:

"It will not be contended that a contract to erect a building upon real property and make a lease thereof for a period of ten years is valid under the statute of frauds unless it be in writing."

Since the statute of frauds of Washington is restricted to real estate or any interest therein, or incumbrance thereon, and the community property statute refers to the sale, conveyance or incumbrance of real property, and since both statutes have been held applicable to leases of realty, it cannot be denied that the local law of Washington establishes the fact that a leasehold interest is an interest in land. This conclusion is in accord with the views of this court in the following cases:

Freeman v. Dawson, 110 U. S. 264-272;
Insurance Company v. Haven, 95 U. S. 242.

We have discussed this question as though it were an ordinary police power case. While we think that it can be sustained as such, it is nevertheless submitted that in any event the power which has been exercised here and validity of which is attacked, is a broader power than exists where there is involved merely the right of a citizen to follow the the ordinary pursuits of life in which the state has no special interest. The power to prevent the alien dominion of our soil is the necessary result of our political existence. It need not be justified by concrete instances of apprehended dangers, as we have attempted to do in an excess of caution, but should simply be recognized as one of the necessary incidents of governmental existence. Every writer on the law of nations and all civilized countries have recognized its existence since the beginning of history. It is a part of the sovereignty of a state, and of a kind, we submit, never intended to be taken away by the Fourteenth Amendment.

IV.

Equal Protection of the Laws.

An elaborate argument is made by appellants with respect to the alleged discriminatory features of this statute which the simplicity of the question seems to make in a large part unnecessary. The act classifies all persons into two classes: (1) citizens and aliens who have in good faith declared their intention of becoming citizens, and (2) un-

naturalized aliens and those whose declarations of intention have not been made in good faith. Persons belonging to the second class are prohibited from holding land or any right to the rents, issues and profits thereof.

It is said that because section 2169, Revised Statutes (18 Stat. 316) restricts the right of naturalization to aliens who are free white persons and persons of African nativity or African descent, that therefore the act unlawfully discriminates against the members of those races who are excluded from the privilege of naturalization by the section.

A consideration of a classification based upon the police power always involves two inquiries: (1) Is the act within the police power, and (2) If so, does it so discriminate with respect to persons affected thereby as to deny the equal protection of the laws to those included? We have already considered the statute from the standpoint of the police power. The decisions of this court to which we have referred sustain beyond question the power of a state to prohibit the alien ownership of real property. These decisions can only be supported upon the theory that the public welfare demands that persons who are not at least morally bound by the obligations of citizenship shall not be permitted to exercise privileges which have so intimate a connection with the public weal. The mere statement of the cause for the exercise of the power in this instance would seem to prevent any question of classification from

arising because the statute includes the entire field which occasioned the exercise of the power. Apparently conceding the general power of the state to classify all aliens in this particular way, the appellants seek to avoid the application of the rule by adverting to the fact that section 2169 discriminates against certain races, and it is claimed that the result, in so far as the state statute is concerned, is therefore that aliens, who may possess the same characteristics which make for as good citizenship as those to whom the privilege is extended, are denied the equal protection of the laws.

This may be easily answered, both by precedent and upon principle. From the passage of the Act of March 26, 1790 (1 Stat. 103) to the Act of July 14, 1870 (16 Stat. 254), the privilege of naturalization was restricted to free white persons. In 1870, this privilege was extended to the negro, but the members of the Mongolian and Malay races have always been excluded from naturalization from 1790 to the present time.

Ozawa v. U. S., U. S. Sup. Not yet reported.
In Re Saito, 62 Fed. 126;
In Re Kumagai, 163 Fed. 922;
In Re Knight, 171 Fed. 299;
In Re Young, 195 Fed. 645;
In Re Ozawa, 4 Hawaii Dist. 643.

While the decisions of this court with respect to the alien ownership of real property heretofore referred to do not refer to the classification then

existing under the naturalization laws, the same alleged discrimination did, in fact, exist, and the statements made therein were all erroneous if appellant's view be adopted.

Considered from the standpoint of principle, the error in the argument lies in the failure of appellants to correctly understand the reason for the rule. The justification for the act under the police power does not rest upon the racial characteristics of various races or upon the idea that the excluded classes may not be law abiding and industrious, as seems to be assumed by the appellants. If this were so, the contention might merit serious consideration. The regulation is occasioned by the legislative view that persons who are not at least morally bound by obligations of citizenship should not be permitted to obtain control of a thing so vital to the political existence of a state as is the land. The question of whether certain persons should be permitted to assume those obligations is entirely legislative, and consequently immaterial here. It is sufficient that Congress has refused to extend those privileges to certain races. It is no reflection upon the members of those races to say that having so acted, we cannot reasonably expect from them anything more than obedience to the letter of the law. In so far as the public welfare is concerned, however, it can make no difference whether their refusal to recognize those obligations is occasioned by deficiencies in their character or by an act of Congress. The result is the same in either

case in so far as the public welfare of the state is concerned; that is to say, a thing upon which the state depends for its existence passes into the hands of persons who recognize no voluntary obligations to it.

The police power of the state extends to all subjects which affect the public welfare and the alleged fact that if the national government had acted differently, the occasion for the exercise of the power would not have arisen is of no relevancy. This factor marks the distinction between the case of *Truax v. Raich, supra, Yick Wo v. Hopkins,* 118 U. S. 356, and various decisions of state and lower Federal courts holding invalid attempts to deprive aliens of the right to engage in various occupations and the case at bar. The case of *Yick Wo v. Hopkins, supra,* is illustrative of this difference. In that case it was made to appear that an ordinance, prohibiting the maintenance of hand laundries in wooden buildings without the consent of certain municipal officers, had been construed as permitting those officers to refuse permits to Chinese, while at the same time giving them to all other persons similarly situated. This action was clearly discriminatory, because there is nothing in the business of maintaining a hand laundry in a wooden building which, of itself, has any relation to the public welfare. The only basis for classification there was the method of carrying on the occupation, a circumstance not related to citizenship.

In the present case, the necessity for the state action is occasioned by the very thing upon which the classification is based, which is quite a different question. Similarly, the statute considered in *Truax v. Raich* was discriminatory, because it sought by a classification based upon citizenship to establish a prohibition with respect to occupations in which the presence of aliens could have no relation to the public welfare. A review of all the decisions cited by appellants upon this point would serve no useful purpose. They either merely involve the application of general principles to different situations, or else are cases involving general occupations in which the participation of aliens could not possibly be detrimental to the public welfare. We have already shown that such is not the situation with respect to the present statute.

It is also argued that in any event, an arbitrary classification is made because aliens who have in good faith declared their intention to become citizens are permitted to hold real estate, whereas the same privilege is denied to all other aliens. The fallacy of this argument is apparent if the grounds for the classification which we have heretofore suggested be accepted. Declarants in good faith are included in the same class as are citizens, because they have taken the preliminary steps looking to citizenship and presumably will, in due course, attain that citizenship. The danger to the public welfare incident to the ownership of real property by persons of this class

may therefore be reasonably said to be less than in the case of those aliens who have taken no steps looking to the abandonment of their obligations of allegiance to other governments. The fact that to a more or less extent the same danger may be common to two classes of persons would not for that reason render a regulation directed at one class only void, under the numerous decisions of this court. The case of *Patsone v. Pennsylvania,* 232 U. S. 138, is peculiarly applicable. A statute of Pennsylvania made it unlawful for "unnaturalized foreign born alien residents" to possess certain weapons, but did not apply to nonresident aliens. Answering the contention that this was an unlawful discrimination, this court said:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 80, 81. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' "

Similarly, in *Central Lumber Co. v. So. Dakota*, 226 U. S. 157-160, this court said:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists *without covering the whole field* of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." (Italics ours.)

In *Miller v. Wilson*, 236 U. S. 373, this court, in sustaining a statute of California which provided for an eight hour day for women but exempted from its operation women employed in certain industries, said:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281. It is free to recognize degrees of harm, *and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.* As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co. v.*

Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856." (Italics ours.)

In *Keokee Coke Co. v. Taylor,* 234 U. S. 224, a statute which prohibited certain businesses from issuing store orders to employees but which did not apply to all employments, was held not discriminatory in the following language:

"But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating *other instances to which it might have been applied equally well,* so far as the court can see. That is for the legislature to judge unless the case is very clear." (Italics ours.)

See also: *International Harvester Co. v. Missouri,* 234 U. S. 199.

Under these authorities it seems apparent that if the reason for the existence of this power which we have suggested be accepted, then there can be no substantial question with respect to classification. This is so because there is an obvious difference between the service to the state to be expected from a person who has been permitted in a formal way to declare his intention to abandon his allegiance to another nation and one who has not taken that step. As we have heretofore pointed out, the fact that his failure to take the step may be occasioned by the action of the National Government would not in any wise affect the question, and indeed, might, by the

creation of a feeling of resentment make the necessity for the restriction more urgent.

In brief, the position taken by appellants, if correct, modifies all restrictions in all the states of the United States upon the alien ownership of real property so long as Congress does not see fit to extend to all aliens the right of naturalization. This conclusion would necessitate a reversal of a long and uniform line of decisions by this court in which the power to make this restriction has been consistently affirmed, and to impute to the framers of the 14th Amendment an intent to impose upon governmental sovereignty a restriction never recognized by any civilized nation.

V.

The Treaty.

Article I of the Treaty of Commerce & Navigation with Japan (37 Stat. 1504), provides:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is claimed that the application of this statute to the situation described in the bill of complaint is

violative of this Treaty. The bill shows that the land involved is agricultural land, and that the appellant Nakatsuka is a farmer who desires to use the land for the purpose of raising agricultural products to be sold by him both at wholesale and retail, and also that he is engaged in trading in farm products, both at wholesale and retail. Disregarding for a minute the alleged fact that Nakatsuka is both a farmer and a produce dealer, and considering the treaty as applied to the right to lease lands for agricultural purposes, the non-application of that instrument is at once apparent. The treaty deals specifically with the matter of leases. It gives to the subjects of the contracting parties the right "to lease land for residential and commercial purposes." Clearly, therefore, it was not the view of the signatories to that instrument that the matter of leasing was included within any other article nor was it the intention to permit the leasing for all purposes, else the treaty would have so provided, instead of specifically designating the purposes for which leases might be made. The bill concedes that the land is not proposed to be leased for residential purposes. If an agricultural lease is included, therefore, it must be included upon the theory that the raising of agricultural products is commerce. If this be true, then it is difficult to imagine any purpose which would not be included, save perhaps leases to eleemosynary institutions or for charitable purposes, a violent construction indeed. While it is true that treaties should be liberally

construed in order to effectuate the intention of the parties, it is also true "that in their construction words are to be taken in their ordinary meaning." *Geoffrey v. Riggs*, 133 U. S. 258. Agriculture and trade and commerce have always been understood as constituting separate and distinct occupations. This popular conception has been expressed in instances too numerous to enumerate. Congress has recognized the distinction by the creation of the Department of Commerce & Labor and the Department of Agriculture. Many of the state governments have likewise created separate departments regulating agriculture. Legislation, both state and Federal, has uniformly treated the two occupations as distinct. It is unnecessary, however, to cite individual instances, because the question has already been determined by this court. Whatever may be the degree of liberality which should be exercised in the construction of treaties, it certainly is not any greater than is applied in the consideration of the powers of Congress under the commerce clause.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186;

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211;

Texas & P. Ry. Co. v. Rigsby, 241 U. S. 33.

This court has uniformly held that the power delegated to Congress to regulate interstate commerce does not include the right to regulate the manufacture of commodities, although intended for subse-

quent transportation in interstate commerce, either by direct regulation or by the prohibition of movements in interstate commerce.

In *Kidd v. Pearson,* 128 U. S. 1, it was declared that the manufacture of intoxicating liquor was not commerce, although intended to be subsequently moved in that commerce. It was there said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile v. Kimball,* 102 U. S. 691, 702 (26: 238, 241), is as follows: 'Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does

not the wheatgrower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

In *United States v. Knight,* 156 U. S. 1, this court held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition in the production of sugar for the reason that the manufacture of sugar was not commerce. It was said in the opinion:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

Consequently, in *Capital Dairy Co. v. Ohio,* 183 U. S. 238-245, it was held that a state statute which prohibited the manufacture of oleomargarine did not controvert the commerce clause.

In *Hammer v. Dagenhart,* 247 U. S. 251-272, this court declared void an act of Congress which sought to restrain the movement in interstate commerce of

manufactured articles produced under certain conditions. Mr. Justice Hughes there said:

"The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."

See also:

Delaware L. & W. Ry. Co. v. Yurkonis, 238 U. S. 439;

Crescent Cotton Oil Co. v. Miss., 66 L. Ed. 55-57.

No good reason can be perceived why these cases are not equally applicable to the present situation. The preamble of the treaty recites that it is a "treaty of commerce and navigation." The phrase "commercial purposes," would naturally, therefore, be construed as of or pertaining to commerce. A judicial definition of the word "commerce," as used in the Constitution, which is changeable only by amendment to the organic law, cannot be said to be narrow or illiberal when applied to a treaty which is subject to repeal by either party or modification by joint agreement. The view of this court in these cases was not based upon any particular use of the word "commerce" in the Constitution or on legislative history, but, as was stated in *Kidd v. Pearson, supra,* it was the understanding which the court found to be conveyed to the common mind by the word as "clearly expressed in economic and political literature."

Appellants do not make the direct contention that the word "commercial" includes agriculture. They call attention, however, to that portion of Article I which gives to the subjects of the two nations the right "to do anything incident to or necessary for trade," and they seek by definitions of the word "trade" to include agriculture. There might be some plausibility to the contention were it not for the fact that the preceding portion of the article treats specifically with the matter of leases. If it had been the intention of the parties to permit leasing by the clause relating to the doing of things necessary for trade, then there would have been no occasion or necessity for an express provision in regard to leases which it will be noted is restrictive. Reading the phrase "commercial purposes" and the clause relating to the doing of things incidental to trade together, it must be concluded that the word "trade" refers to commerce, and commerce, as we have already shown, does not include agriculture. In any event, the legislative history of this treaty, to which we shall hereinafter refer, shows quite conclusively that it was understood by both parties that the treaty did not cover the leasing of realty for purposes of agriculture by subjects of either.

The application of the doctrine announced in these cases is also sought to be avoided in the bill by the allegation that the appellant Nakatsuka, in addition to being a farmer, is also a dealer in farm products which he sells at wholesale and retail, and

that he intends to sell the products to be raised on this land in the course of such business. We are unable to see how the fact that Nakatsuka may be engaged in an occupation which comes within the treaty could affect his rights to carry on another business not protected by that instrument. Sale is a necessary incident to agriculture and manufacture; yet it has been held that this fact does not make the manufacturer a farmer or a trader. It was said in *Kidd v. Pearson,* 128 U. S. 1-21:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, fisheries, mining—in short, every branch of human industry."

In *Diamond Glue Co. v. U. S. Glue Co.,* 187 U. S. 611, 616, it was said that the imposition of a tax and certain other requirements upon a manufacturing corporation which shipped its products in interstate commerce did not burden that commerce. This contention was stated as follows:

"The superintendence and manufacture had to come before sale. The small requirements of this act before allowing plaintiff to do business in the state, if good as to the business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere."

Under these authorities the fact that Nakatsuka sells his product is immaterial. This being so, we fail to see how the fact that as a trader, he at the same time sells the products of another in a commercial sense, changes the situation. Suppose that it had been alleged that Nakatsuka, in addition to being a farmer, was also a dealer in automobiles. We apprehend that appellants would not contend that for that reason his rights as a farmer under the treaty would be any greater than those of his countrymen whose status was purely agricultural. We have already shown that the sale of farm products is merely a necessary incident to trade and commerce, and not a part thereof. Since that sale is the only connecting link between his activities as a trader and as a farmer, its rejection as a part of trade and commerce makes the situation the same as it would be in the case which we have supposed.

Any other conclusion would, in its practical effect, make the treaty extend to all forms of realty proposed to be used for purposes of profit. For instance, if the effect of the law may thus be evaded, then, by the same logic any dealer could appoint a farmer as his agent for the purpose of raising these products for the same alleged commercial purposes, with a consequent result that the treaty would permit leases for all agricultural purposes.

An elaborate argument is made by appellants in support of the contention that the treaty prohibits

any act which works any discrimination against the Japanese as compared with other races. No portion of the treaty is cited which is susceptible of such a construction, the entire argument being based upon the rule of liberality which it is said ought to obtain in the construction of treaties. Aside from the treaty itself, there is a sufficient and cognate reason for the instant rejection of this argument. In the case of *Sullivan v. Kidd,* 254 U. S. 433, this court said:

"While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act, should be careful to see that international obligations are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

After which the court proceeded to quote from an unpublished letter of the Secretary of State construing the particular treaty there before the court.

This treaty has been the subject of diplomatic negotiations between the State Department and Japan, and the State Department has already announced a construction inconsistent with that contended for by appellants. This correspondence will be found in a printed document in the Library of Congress, entitled: "Resume of the Controversy Between Japan and the United States Arising Out of the California Question, Class JV 6888, Book C2J4." Upon the fly leaf of this book is a printed sticker of the De-

partment of State, Bureau of Rolls and Libraries, with the following notation:

"This is said to be an official Japanese publication printed at Tokio."

We have been informed by the Attorney General of California that this correspondence also appears at pages 632 to 652 of "Papers Relating to Foreign Relations of the United States, 1913, Department of State, United States of America." We have not been able to verify this latter citation, however. We assume that there is no doubt concerning the authenticity of this correspondence, since it was referred to by the District Court and its correctness is not attacked in the briefs of appellant.

From this correspondence it appears that upon the passage of the California Alien Land Act of 1913, which provided restrictions upon alien ownership not dissimilar to those imposed in the act in the case at bar, the Japanese Government officially protested against the act upon the ground that in some of its features it violated the treaty. In passing, it is worthy of comment, however that it apparently acquiesced in the proposition that agricultural leases did not come within the terms of the treaty, although the act restricted agricultural leases to terms of three years. For instance, upon page 2 of this document the statement appears:

"It is true that under the law, Japanese are granted the right to lease agricultural lands for a short term—*a right which is not expressly secured*

by the Treaty—but they are denied the right to acquire, possess and inherit land, whereas that right is freely granted to other aliens." (Italics ours.)

Upon page 8 there is an account of an audience had between the President of the United States and the Japanese Ambassador. The Japanese Ambassador read a memorandum relating to the California act and the treaty, and in reply the President stated:

"That if on further study the law should be found to be in conflict with the treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

We regard this statement as quite pertinent with respect to the executive construction of this treaty, since, in so far as we are informed, the Government never made any effort to seek a judicial remedy in behalf of the Japanese affected by the California act or to compensate them, although it appears that the President had undertaken to do this if he should become convinced that the act was in conflict with the treaty. The correspondence set forth in this document is particularly material. Included therein is a letter from Viscount Chinda to Secretary of State Bryan, written under date of May 9, 1913. In this letter the Ambassador protested against the California act upon various grounds not here involved, but at the same time he did not controvert the proposition that agricultural leases are not protected by

the treaty. This appears from his statement upon page 3 of this document, where he said:

"Moreover, in its relation to *house property*, the legislation appears to be, in a much wider sense, repugnant to the provisions of the first clause of the same Article, by which Japanese subjects are granted, in reciprocity, and upon the same terms as American citizens, the right to own houses, manufactories, warehouses and shops."

Letter No. 6 consists of the memorandum prepared by the legal advisor to the Japanese Ambassador under date of July 3, 1913. This memorandum makes various objections to the California act but does not deny the proposition that agricultural leases are not included. The view of the State Department is made conclusive by letter No. 7, which appears upon page 15 of the appendix, and is a letter of Secretary of State Bryan to Viscount Chinda, written under date of July 16, 1913. Without reviewing this letter in detail it may be said that the conclusion which the State Department reached was that the California act did not violate the treaty. Mr. Bryan, in referring to the particular provisions of Article 1 which are relied on by these plaintiffs, said:

"This treaty was based upon a draft presented by the Imperial Government. In Article I of this draft there is found the following clause:

" '3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops,' and 'to lease land for residential and commercial purposes.' It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes' and that the phrases 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands were omitted.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective States. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject Baron Uchida said:

"'In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the States, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate States.*' (Italics Mr. Bryan's.)

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese Ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from States in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that State for agricultural purposes for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty *which does not grant the right to lease agricultural lands at all;* and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the States, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual States. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

The court will therefore observe that it was the view of Mr. Bryan that the Act of 1913 was not in conflict with the treaty. Attached to the letter of Mr. Bryan is a document apparently prepared by the legal adviser to the State Department, which answers the points raised by the legal adviser to the Japanese Ambassador, and in which the conclusion is reached that the California act does not violate the treaty. It is interesting to observe that this

document, although prepared immediately after the enactment of the treaty, also meets the objection raised by appellants with respect to alleged discrimination. The California act permitted aliens eligible to citizenship to hold real property, but denied this privilege to those ineligible except where conferred by express treaty. The Japanese Government raised exactly the same claim with respect to discrimination as have appellants in the case at bar. The legal adviser of the State Department simply answered this with the statement that "the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

We desire particularly to emphasize the fact pointed out by Mr. Bryan in his letter of July 16, 1913, that the treaty as originally drafted by the Japanese Government included the right to lease land for "industrial, manufacturing and other lawful purposes," but that this clause was thereafter withdrawn for the reason that the Japanese Government "desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation."

Attention is likewise directed to the further fact that when the California Act of 1913 was pending in the legislature of California, Secretary of State Bryan made a trip to California to prevent its enactment. (Congressional Record, 66th Cong. 3d Sess., Vol. 60, p. 4148.) There is no record, how-

ever, that it was ever claimed by the State Department that the contemplated act violated the treaty.

Since it thus appears that Mr. Bryan was opposed in principle to legislation of this character, his view as to the meaning and scope of the treaty is for that reason entitled to the greater consideration. It is submitted that there is nothing in the treaty which prevents a state from prohibiting the leasing of realty to Japanese aliens. The question of whether or not there are other features of the act which might come in conflict with the treaty is not before the court, because it will be presumed that whenever such a conflict arises, the state authorities of Washington will give due and proper regard to the terms of the treaty.

The judgment of the trial court was correct, and should be affirmed.

Respectfully submitted,

L. L. THOMPSON,
Attorney General, State of Washington,
Solicitor for Appellee.

E. W. ANDERSON,
of Counsel.

APPENDIX.

CHAPTER 50.

[H. B. 79.]

ALIENS.

AN ACT relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

(c) "Land" also includes any share or interest in a corporation or other organized group of persons deemed

an alien in this act which has title to land either heretofore or hereafter acquired;

(d) To "own" means to have the legal or equitable title to or the right to a v benefit of;

(e) "Title" includes every kind of legal or equitable title;

(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

(g) "Inheritance" includes devise;

(h) "Mortgage" includes every kind of lien upon land;

(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

(j) "Person" includes an individual, partnership, corporation or any other organized group of persons.

SEC. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

SEC. 3. An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land: *Provided,* An alien now lawfully acting in any such capacity may continue for not more than two years.

SEC. 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the

ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

SEC. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

SEC. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

SEC. 7. Whoever

(a) Knowingly transfers or conveys land or title to land to an alien; or

(b) Knowingly takes land or title to land in trust for an alien; or

(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the

county where the land is situated the nature and extent of his interest in and title to the land; or

(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

(g) Wilfully counsels, aids or abets another in violating or evading this act,

Is guilty of a gross misdemeanor.

SEC. 8. It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

SEC. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

SEC. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

SEC. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such ad-

judication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

SEC. 12. Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

Passed the House February 25, 1921.

Passed the Senate March 2, 1921.

Approved by the Governor March 8, 1921.

[No. 17285. Department One. October 14, 1922.]

THE STATE OF WASHINGTON, *Appellant*, v. E. J. O'CONNELL *et al*, *Respondents*.[1]

Aliens (3)—Real Property—Constitutional and Statutory Restrictions.

Conversion (1)—Equitable Conversion—Real Property as Personalty—Statutes.

Treaties (3)—Operation as to Laws Repugnant to Treaty Provision.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 23, 1922, dismissing an action to escheat alien lands, upon sustaining a demurrer to the complaint. Reversed.

Malcolm Douglas, Arthur Schramm, Jr., and *Bert C. Ross*, for appellant.

Pierce Lonergan, for respondents.

The Attorney General, amicus curiae.

BRIDGES, J.—This case concerns the anti-alien land law of the state of Washington, being ch. 50 of the Laws of 1921, p. 156. It will be necessary, even at the risk of making this opinion of undue length, to set out in considerable detail the constitutional and statutory pro-

visions governing the question, and also the declaration of trust hereinafter mentioned.

Section 33 of our constitution, so far as it affects this case, reads as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void. . . ."

Section 2, ch. 50, p. 157, Laws of 1921 (Rem. Comp. Stat., § ——) reads as follows:

"An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."

By this act, an "alien" is defined as one who has not declared his intention to become a citizen of the United States. It defines "land" as not including lands containing valuable deposits of minerals, etc., "but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof. . ." The word "own" is defined to mean "the legal or equitable title to or the right to any benefit of" land; and the word "title" includes "every kind of legal or equitable title."

After the passage and going into effect of this statute, certain land was deeded to the respondents, J. D. O'Connell and Pierce Lonergan, as trustees, and they

made, executed, acknowledged and caused to be recorded a declaration of trust, which shows that they hold the land in question (which is residential and non-mineral property in the county of King, in the state of Washington) for the benefit of the *cestuis que trust* upon the following terms:

"1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion or distribution, except that the same shall not be postponed beyond the end of twenty years from July 1, 1921. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

"2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

"3. In trust to collect and receive all rents and income from the property, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development, of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determination of the

Trustees made in good faith as to all questions as between 'capital' and 'income' shall be final.

"4. This trust is declared in favor and for the benefit of E. J. O'Connell and D. P. O'Connell, a minor, each having a one-half beneficial interest as shown by certificates of interest which shall be issued to each of them by the undersigned Trustees; which certificates and all others which may be hereafter issued in exchange or substitution therefor shall be deemed parts hereof and conclusive evidence of the ownership of respective interests in this Trust; and the Trustees shall from time to time on request (on surrender of the old) issue such new certificates as may be proper or necessary to evidence any new or subdivided interests. . . .

"6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties.

"7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the Trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

. . .

"9. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent, reckoned upon the gross income received by them as such, unless at any time a majority in interests of the cestui que trusts consent in writing to some larger compensation for any past service; but in no event are they to receive less than $50.00 per year each. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses shall be considered proper expenses. . . .

"11. The terms and provisions of this Trust may be modified at any time or times by instruments in writing, signed, sealed and acknowledged by the then Trustee,

assented to in writing by the cestuis que trusts and attached to the original of this instrument. . . .

"14. At the end of twenty years from and after July 1, 1921, (unless this trust shall heretofore have been otherwise lawfully terminated) all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled."

The state of Washington instituted suit for the purpose of escheating to itself an undivided one-half interest in the property. The complaint alleged the execution and set out the terms of the trust declaration, and further alleged that all of the transactions took place subsequently to the going into effect of the above mentioned 1921 law, and that E. J. O'Connell, one of the *cestuis que trust* mentioned in the trust declaration, was and is an alien, and has not declared his intention to become a citizen of the United States, and was and is a subject of the British Empire. The trial court sustained a demurrer to the complaint, and the state has appealed from a judgment dismissing the action.

The sole question before us is: does the trust arrangement above set out violate our anti-alien land act.

It has become the settled law of this country that, in the absence of a treaty to the contrary, a state may lawfully prohibit aliens from owning or acquiring any lands, or any interest therein, within its borders. *Orr v. Hodgson*, 4 Wheat. (U. S.) 452; *Hauenstein v. Lynham*, 100 U. S. 483; *United States v. Repentigny*, 72 U. S. 211; *DeVaughn v. Hutchinson*, 165 U. S. 566; *Blythe v. Hinckley*, 180 U. S. 333; *Clarke v. Clarke*, 178 U. S. 186; *Jones v. Jones*, 234 U. S. 615; *Sullivan v. Kidd*, 254 U. S. 433.

Judge Cushman, in the recent case of *Terrace v. Thompson, Attorney General*, 274 Fed. 841, discussing

another feature of this same statute, forcefully wrote concerning its purposes as follows:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged."

Our constitution provides that "the ownership of lands by aliens . . . is prohibited in this state . ." It was entirely within the province of the state legislature to determine by legislation what are lands, and when one becomes an owner thereof, within the meaning of the constitutional provision. In so doing, it has declared that "land" "does not include lands containing valuable mineral deposits," etc., "but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof . . ." and it has said that ownership includes "the right to any benefit of" lands.

For the purposes of this discussion, it may be conceded that, under the declaration of trust involved here, the alien does not have the right to the control, possession and use of the lands involved, and that he does not own the legal or equitable title; but that he owns the "right to the benefit of" the land, and has the "right to" the "enjoyment, rents, issues and profits thereof," there cannot be any doubt. These rights are by the legislature defined to be land or an interest in or benefit of land, and they are most surely in violation, not only of the spirit of our legislative act, but the very words thereof. To

hold that an alien may lawfully place the title to lands in this state in the name of someone else and yet be entitled to the income therefrom, would be to destroy the very object and purpose of the law, and make it possible, at very little inconvenience and cost, for the alien to circumvent it. For if one be entitled to the rents and issues of land, and also the sales price in which would be included any increase of value, he would have all the real substance of actual ownership, and would, at most, be deprived only of the actual legal title, personal possession and personal control. These might, with reasonable safety, be entrusted to someone else. If thereby he runs the risk of the honesty of the trustees, he finds the courts of the country open to him to protect him against any of their dishonest acts.

The respondents very earnestly insist that there is nothing in the trust declaration which says that the alien is to receive any of the rents, issues or profits. It may be conceded that there is not to be found within the instrument any express words which would bind the trustees to pay the rents and income to the alien, either periodically or at the termination of the trust. But it is expressly provided that the trustees shall "collect and receive all rents and income from the property . . ." and they are authorized to use any money in their hands for repair, upkeep and expenses. But what is to become of the remainder of the income? Certainly the trustees are not personally entitled to those funds. Their compensation is fixed by another section of the trust declaration. They must, in good conscience, retain the unexpended portions of the rents, issues and profits for the benefit of the *cestuis que trust*. It is immaterial whether they must account for those funds and pay them annually or when the land is finally sold and the trust ended. The

moneys arising from rents and income cannot lose their character as such simply by delay in the time of their payment. If they are rents and income when paid monthly, they are likewise rents and income when paid at any future period. If this instrument should be held valid and the trustees should refuse to account for the rents and profits found in their hands, the *cestuis que trust* would have no hesitancy in appealing to the courts of the country for the enforcement of their rights, and would doubtless be successfully heard. We have no doubt, therefore, that the rents, issues and profits which, by the statute, are declared to be land or an interest in land, and which the trustees are authorized and expected to collect from time to time, are held for the *cestuis que trust* and must—if not annually—ultimately be paid to them, less such sums as may have been properly expended under the terms of the trust declaration.

The respondents contend that the doctrine of equitable conversion must be controlling of this case. That question has been elaborately and learnedly briefed and argued by both sides, and by the *Attorney General* in an *amicus curiae* brief. While the doctrine may have some bearing in a general way on the question before us, yet we are convinced that a too elaborate discussion of it would only serve to confuse the real point in issue, which is, a proper construction of the anti-alien land law, and its application to the facts of this case. In vol. 6, R. C. L. p. 1065, it is said:

"Equitable conversion may be defined as that constructive alteration in the nature of property by which in equity real estate is considered for certain purposes as personalty and transmissible and descendible as such, or personal estate as realty. It is an outgrowth of application of the old maxim that equity regards that as done which ought to be done, and therefore, to the opera-

tion of the doctrine it is essential that the property to be so treated should be subject to a trust or a clear and imperative direction for conversion."

And on the following page it is said:

"As the phrase itself implies, equitable conversion is a mere fiction of equity, the basic principle of which is that a court of equity, regarding the substance and not the mere form and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed. where nothing has intervened which ought to prevent a performance."

A typical case is that of *Benham v. Taylor,* 5 How. (46 U. S.) 233. This case came from a state where there was a statute prohibiting aliens from owning lands. William F. Taylor's will provided that as soon as possible after his death all of his real estate and personal property should be, by his executors, converted into money, and after making certain bequests of money to various persons, he gave the remainder of his property to a brother and sister, who were aliens. It was contended that the will was void in so far as the aliens were concerned, because, under the statute, it was unlawful for them to take or hold real estate or any interest therein. The court, in substance, held that, in order to avoid an escheat and carry out the wishes of the testator, a court of equity, if necessary, would consider land as money, where a testator, who was a trustee, has directed the land to be sold, and the will directs the proceeds to be given to the *cestuis que trust.*

How can that doctrine be of avail to the respondents? Equitable conversion is not a rule of law, but is a fiction which will be enforced only when necessary to accomplish manifest justice, and never to circumvent the public policy of the state as expressed in statutory form. The

legislature is not bound by this legal fiction. It may repudiate it in whole or in part. It has declared that the rents, issues and profits are to be considered as land, or, at least, a beneficial interest in land, and thus there is no room left for the application of the doctrine of equitable conversion, even though it might be applied in a case of this character under a statute different from ours. The question here is not one of the application of an equitable fiction, but one of the construction of an act of the legislature. If the trust declaration comes within the letter or spirit of our statute, then it is void, notwithstanding the doctrine of equitable conversion.

But there is another reason why that doctrine is inapplicable to the facts of this case as pleaded. Mr. Pomeroy, in the 3rd volume of his work on Equity Jurisprudence § 1160 (4th ed.), speaking of this doctrine says:

"The rule is therefore firmly settled, that in order to work a conversion *while the property is yet actually unchanged* in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property,—that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting —that is, the act itself of selling the land or of laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them."

All of the authorities seem to uphold this declaration of Mr. Pomeroy. In the declaration of trust involved here, there is no imperative agreement to convey the property. It is true, section one provides that the property shall be converted into money and distributed at some time within twenty years, but section eleven of the declaration practically nullifies this provision of the agreement, for it provides that,

"The terms and provisions of this trust may be modified at any time or times by instruments in writing, signed, sealed and acknowledged by the then trustees, assented to in writing by the cestuis que trust and attached to the original instrument."

Under this provision, by agreement of all the parties concerned, any and all of the terms of the declaration of trust may be modified in such a way as that the alien might become the absolute owner of the property involved, and have the actual control and possession thereof. But the view we have already taken of this question makes it unnecessary to pursue this particular phase of the argument farther.

The respondents forcefully argue that the interpretation of the statute which we have given would be in violation of the treaty of 1899, between Great Britain and the United States, which instrument is found in vol. 31, U. S. Stats. at Large, p. 1939. Article one of the treaty is with reference to real estate, and provides that "where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other were he not disqualified by the laws of the country where such real property is situated," such citizen or subject shall be allowed a designated time within which to dispose of such property. Article two, being the one relied on by the respondents, is as follows:

"The citizens or subjects of each of the Contracting Parties shall have the power to dispose of their personal property within the territories of the other by testament, donation or otherwise; and their heirs, legatees and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property and may

take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases."

It will be noticed that Article two of the treaty is with reference to personal property—that is, property which may not fairly be considered real property. The respondents argue, however, that the state may not, by legislation, convert what is commonly and universally recognized as personal property into real estate or an interest therein and thereby cause an escheat, and that when the legislature undertook to declare rents, issues and profits to be "land" or beneficial interests in land, it violated the treaty provision.

It may be admitted that the legislature may not, by mere arbitrary definition, convert that which has always been known as personal property into real property, because such legislation would be in violation of the spirit of the treaty. But there are certain things which, in and by themselves, would be considered personal property; yet, because of their close and intimate connection with the land, may rightly be declared to be parts of, or interests in, the land. Such are rents, issues and profits derived from land, where ownership or beneficial interest therein is prohibited as by the legislation under consideration.

We are convinced that the transaction we have been considering violates our anti-alien land law, and the court erred in sustaining the demurrer to the complaint and in dismissing the action. The judgment is reversed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

Index

CITATION OF AUTHORITIES

	PAGES
Abrams v. State of Washington, 45 Wash. 327	24
Allgeyer v. Louisiana, 165 U. S. 578, 589	38
Barbier v. Connoly, 133 U. S. 27	38
Bishop on Contracts, Sec. 595	32
Bishop, Noncontract Law, Sec. 156	32
Buchanan v. Warley, 245 U. S. 60, 76	36, 38
Butts v. Merchants and Miners Transp. Company, 230 U. S. 126	42
Carey v. City of Atlanta, 143 Ga. 192	38
City of Minneapolis v. Reum, 56 Fed. 576 581	30
Connolly v. Union Sewer Pipe Company, 184 U. S. 540	38
Corin v. Glenwood Cemetery, 69 Atlantic Rep. 1083	19
Cotting v. Kansas City Stock Yards Company, 183 U. S. 79	38
Cummings v. State of Missourl, 4 Wall. 277 325	26, 32
Davis v. Gray, 16 Wall., p. 230	31
Endlich on Interpretation of Statutes, Sec. 441	31
Fairfax' Devisees v. Hunter's Lessee, 7 Cranch 619	24
Frick v. Lewis, 195 Fed. 693	30
Goefroy v: Riggs, 133 U. S. 258, 271	13

CITATION OF AUTHORITIES
(Continued)

	PAGES
Guinn v. United States, 238 U. S. 347	32
In re Ah Chong, 2 Fed. 733	32
In re Kleibs, 128 Fed. 656	30
In re Moses, 83 Fed. 995	30
In re Opinion of Justice, 94 N. E. 958	39
In re Polsson, 159 Fed. 283	30
In re Stixrud's Estate, 58 Wash. 339	24
In re Tetsubumi Yano's Estate, 206 Pac. Rep. 995, 998	24
In re Tiburcio, 1 Fed. 481	32
Maloy v. Duden, 25 Fed. 673	30
McFarland v. American Sugar Co., 241 U. S. 79	38, 42
Meyers v. Anderson, 238 U. S. 368	35
Moore, International Law Digest, Vol. 3 p. 130	17
Moore, International Law Digest, Vol. 4, p. 109	17
Prentice v. Howe, 84 Wash. 136	24
Revised Statutes, U. S., Section 1977	38
Royster Guano Co. v. Virginia, 253 U. S. 412	39
Ruling Case Law, Vol. 8, Sec. 167, p. 1107	31
Ruling Case Law, Vol. 28, Sec. 308, p. 320	31
The Slaughter-house Cases, 16 Wall. 36	38

CITATION OF AUTHORITIES
(Continued)

	PAGES
State v. Julow, 129 Mo. 163, 29 L. R. A. 257	38
State ex rel. Atkinson v. World Real Estate Commerce Co., 46 Wash. 104	24
Strauder v. West Virginia, 100 U. S. 303	38
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352	38
Truax v. Raich, 239 U. S. 33, 39; 219 Fed. 273	38
Tucker v. Alexandroff, 183 U. S. 424, 427	13
U. S. Stat. at Large, Vol. 29, p. 618, and Vol. 33, p. 733	35
Vattel, Law of Nations, Book 2, Sec. 275	12
Yick Wo v. Hopkins, 118 U. S. 356	38, 39

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Supreme Court of the United States

October Term, 1922

No. 302

FRANK TERRACE AND ELIZABETH TERRACE, HIS WIFE, AND N. NAKATSUKA,
APPELLANTS

— VS —

LINDSAY L. THOMPSON, ATTORNEY GENERAL OF THE STATE OF WASHINGTON,
APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Reply Brief of Appellants*

The decree appealed from should be reversed because the statute of Washington, the enforcement of which was sought to be enjoined, is invalid:

(A) Because it conflicts with the treaty between the United States and Japan.

* Italics are the writers'.

(B) Because it is in conflict with the Fourteenth Amendment to the Constitution of the United States.

A

THE STATUTE IS IN CONFLICT WITH THE TREATY.

1. It denies to *alien Japanese residents* of the State of Washington, on account of their *race, color and place of nativity*, treatment equal to that accorded other alien residents of Washington of different race and color because of such race and color.

2. It makes an invidious discrimination against alien Japanese residents of Washington on account of their *race, color and place of nativity* not made against *other alien residents* of Washington of *different race and color.*

3. It creates a fictitious status of "*statutory alienage*" which, because of their *race, color and place of nativity, automatically* and *compulsorily attaches to alien Japanese residents* of Washington, rendering criminal *their* purchase, control or lease of land, but which does not attach, with its attendant penalties, to alien residents of Washington of *different race and color* who purchase con-

trol or lease lands unless they fail to exercise their option to avoid such "statutory alienage."

The Japanese, because of race, color and place of nativity, are automatically and compulsorily assigned to the lower and unenviable status of "statutory alienage," while aliens of other races and colors need only occupy such status at their election.

The substance of the statute, so far as it affects this case, is as follows:

1. " 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States." Sec. 1 (a).

2. "Does include all other aliens." Sec. 1 (a).

3. " 'Land' includes agricultural land and the right to the control, possession, use, enjoyment, rents, issues and profits thereof." Sec. 1 (b.)

4. "An alien shall not own land or take or hold title thereto." Sec. 2.

5. "An lien is not qualified to be trustee under a will, executor, administrator or guardian if any part of the estate is land." Sec. 3.

6. Whoever knowingly conveys land to an alien is guilty of a gross misdemeanor. Whoever

aids or abets another in violating the act is guilty of a gross misdemeanor. The person who conveys land to an alien and the alien who purchases are both guilty of a gross misdemeanor. Sec. 7, (a, g.)

7. An alien, having title to land or control, possession, use or enjoyment of land, who refuses to disclose to the Attorney General the nature of his title or interest in land, is guilty of a gross misdemeanor. Sec. 7 (d.)

It is clear from both the excluding and including definition of the word "alien" in the statute that Japanese born in Japan and resident in the State of Washington are automatically and inescapably branded by reason of their *race, color and place of nativity*, with the stigma of "statutory aliens" and in case they purchase, control or lease land, are under the statute guilty of a gross misdemeanor.

It is equally clear from the same definition of "alien" that aliens of other races and color resident in Washington were by the statute, which was approved March 8, 1921, but did not take effect until June 13, 1921, granted the option to entirely avoid the brand of statutory alienage by filing a declaration of intention before the statute

became effective or thereafter to erase such brand by a similar declaration.

That the statute does not in express language state that it is intended to so discriminate against Japanese because of their race, color and place of nativity, is immaterial. The statute would have possessed one less vice had its intent been so expressly declared. It would have been more honest. It would have been more courageous, for it would do away with the pretense that the standard to be complied with to avoid the stigma of statutory alienage is the same for all, although it is common knowledge that it was prescribed, not so that it might be complied with by Japanese, but so that the Japanese could not comply.

It is not, however, the form of the statute which determines whether the standard prescribed is one which is lawful or only a cloak to conceal one which is unlawful. If the statute would have been invalid had it in express language stated that its object was to allow resident aliens to own, control and lease land in the State of Washington, provided they were not Japanese born in Japan, then the statute in the form in which it was enacted is equally invalid because such result is not only the possible effect of the statute, but is the necessary

and inevitable effect of the statute, and such effect was intended as clearly as though it had been expressly so stated.

1. The provisions of the treaty which require consideration and which are quoted particularly to show the standards of treatment agreed upon, are the following: (U. S. Stats. at Large, Vol. 37, pp. 1504-1509):

"The President of the United States of America and his Majesty, the Emperor of Japan, being desirous *to strengthen the relations of amity and good understanding which happily exist between the two nations*, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of *this most desirable result*, have resolved to conclude a treaty of commerce and navigation *for that purpose*."

"ARTICLE I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and,

generally, to do anything incident to or necessary for trade, upon the same terms *as native citizens* or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxation other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive in the territories of the other the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

"ARTICLE IV.

"There shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other, which are or may be opened to foreign commerce: subject, always, to the laws of the country to which they thus come."

"ARTICLE VI.

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other, exemption from all transit duties and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks."

"ARTICLE XI.

"No duties of tonnage, harbor, pilotages, lighthouse, quarantine or other similar or corresponding duties of whatever denomination, levied in the name of or for the profit of government, public functionaries, private individuals, corporations or establishments of any kind, shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally under the same conditions be imposed on national vessels in general or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels from whatever place they may arrive and whatever may be their destination."

"ARTICLE XII.

"Vessels charged with performance of regular scheduled postal service of one of the high contracting parties, whether belonging to the state

or subsidized by it for the purpose, shall enjoy in the ports of the territories of the other the same facilities, privileges and immunities as are granted to like vessels of the most favored nation."

"ARTICLE XIII.

"The coasting trade of the high contracting parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan respectively. It is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most favored nation treatment in the territories of the other."

"ARTICLE XIV.

"Except as otherwise expressly provided in this treaty, the high contracting parties agree that in all that concerns commerce and navigation, any privilege, favor or immunity which either contracting party has actually granted or may hereafter grant to the citizens or subjects of any other state, shall be extended to the citizens or subjects of the other contracting party gratuitously if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional."

"ARTICLE XV.

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trademarks and designs, upon fulfillment of the formalities prescribed by law."

The treaty established two standards of treatment for the citizens or subjects of the respective countries as to all matters covered by the treaty.

1. The standard applicable to native citizens or subjects;

2. That applicable to citizens or subjects of the most favored nation.

Even as to the coasting trade which by Article XIII was excepted from the provisions of the treaty, and was to be regulated according to the laws of the respective countries, the following declaration was made:

"It is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect *most favored nation treatment* in the territories of the other."

Nowhere in the treaty is there any expression indicating that either party to the treaty contemplated the possibility of the citizens or subjects of either being singled out for invidious discrimination as compared with the citizens or subjects of any other nation, whether the particular matter referred to was included in or excepted from the provisions of the treaty. It is impossible, therefore, to suppose that in a treaty which the high contracting parties had resolved to conclude because they were desirous of strengthening the relations of amity and good understanding which happily existed between them, there was concealed the mental reservation on the part of either government that invidious treatment by either of the citizens or subjects of the other, or by a state constituting a part of the territory of either country, would be permissible under the treaty in respect to any matter not dealt with therein.

"Is it necessary, in an enlightened age, to say that mental reservations cannot be admitted in treaties? This is manifest, since by the very nature of the treaty the parties are bound to express themselves in such manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon a mental reservation. What can be the use of such an artifice, unless to lull the op-

posite party into a false security under the vain appearance of a contract?"

Vattel, Law of Nations, Book 2, Sec. 275.

No one will believe that either of the high contracting parties intended any such mental reservation.

It is not necessary that the treaty should in express language forbid the invidious discrimination complained of. Such discrimination is as absolutely forbidden by implication as it would have been had the prohibition been explicitly set forth. If the discrimination complained of is one which is forbidden by the spirit of the treaty the probihition is as absolute as if the discrimination were forbidden by the letter of the treaty.

"It is a general principle of construction with respect to treaties, that they shall be liberally construed so as to carry out the apparent intention of the parties to secure *equality and reciprocity* between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the Public Law of Nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended; and it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it,

and the other favorable to them, *the latter is to be preferred.*"

Geofroy v. Riggs, 133 U. S. 258, 271.

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides* and in a manner to carry out its manifest purpose. Taylor on International Law, Sec. 383. As treaties are solemn engagements, entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and to secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity* so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of a jurisprudence."

Tucker v. Alexandroff, 183 U. S. 424, 427.

The treaty of 1911, in Article XVI, provided as follows:

"The present treaty shall, from the date it enters into operation, supersede the treaty of commerce and navigation dated the 22nd day of November, 1894, and from the same date the last named treaty shall cease to be binding."

The treaty of 1894 between the United States and Japan did not deal with the subject of schools to the same extent that the treaty of 1911 deals with the subject of land, and the provisions of the treaty of 1894 in respect to the two standards of treatment are not different, substantially, from those of the treaty of 1911.

In 1906 the State of California and the School District Board in San Francisco took certain action which the government of Japan claimed constituted an invidious discrimination against Japanese children resident in San Francisco, forbidden by the treaty of 1894. Mr. Root was then Secretary of State of the United States. Two suits were filed in the federal court in California, but were never tried upon the merits. On April 19, 1907, at the first meeting of the American Society of International Law, Mr. Root, then Secretary of State of the United States and President of the Society, delivered an address, in which he explained the controversy which had arisen in California in respect to Japanese children attending the public schools. In that address Mr. Root said (Addresses in International Subjects—Root, pp. 6, 11, 12, 13):

"The excitement has now subsided, so that it may be useful to consider what the question really

was, not because it is necessary for the purposes of that particular case, but because of its bearing upon cases which may arise in the future under the application of the treaty-making power of the United States to *other matters and in other parts of the national domain.*" * * *

"There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any states chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made *and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.* The effect of such a treaty, in respect of education, is not positive and compulsory; it is *negative and prohibitory.* It is not a requirement that the state shall furnish education; it is a prohibition *against*

discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: 'If you provide a system of education *which includes alien children*, you *must not exclude these particular alien children.*' "

It is to be remembered that this address was made by Mr. Root when Secretary of State and President of the American Society of International Law, after Japan had made its protest to the United States against the action of California in discriminating between alien Japanese children and other alien children resident in California, and prior to the making of the treaty of 1911. The government of Japan, therefore, had the right to assume that the position taken by the Secretary of State of the United States upon the question of discrimination between alien Japanese residents and other alien residents was the position of the United States until the United States should advise the government of Japan that such was not the case.

The position of the United States in reference to such discriminations was not a new one. It was, in effect, the same as that which the United States had taken in order to protect the rights of American citizens in Turkey, in Mexico, and had announced it would take in Cuba if necessary.

In respect to the controversy with Turkey, Mr. Bayard, then Secretary of State, said that friendship and comity entitled the United States "to ask and expect that no race or class distinction shall be made as regards American citizens abroad."

Moore, International Law Digest, Vol. 3, page 130.

In reference to the Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on condition of depositing $1,000, the Department of State of the United States said, that it was not aware that any such requirement had ever been demanded of an American citizen resorting to Cuba, and if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by the treaty or recognizable under the amended constitution."

Moore, International Law Digest, Vol. 4, page 109.

In the correspondence referred to in Moore's International Digest, Vol. 6, page 702, concerning the Mexican controversy, it appears that the position of the United States in its protest against the Mexican law which forbade citizens of states bordering on Mexico to acquire title to public lands within a certain area of Mexico upon which such

states bordered, was set forth by the Secretary of State of the United States as follows:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * *. The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens. Although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation, *it may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.*

"It cannot be doubted that if the construction *now claimed had been anticipated* it would have been *thwarted* by *an explicit provision*. There is

believed to be no such discrimination against Mexican citizens in any law in this country."

Under the statute of Washington the government of Japan would be compelled to take the position that if two Japanese brothers should be resident in the State of Washington, one of whom was born in Japan and the other in Africa, it would have to say to the one born in Japan: "No treaty-right between this country and the United States is violated, because you were born in Japan," and to the one born in Africa: "The law of Washington permits you to acquire real estate equally with all other aliens who are of the Caucasian or African race or nativity, but your brother because born in Japan is lawfully branded by the law of Washington with the stigma of 'statutory alienage.' "

Corin v. Glenwood Cemetery, 69 Atlantic Rep. 1083.

It cannot be doubted that the Japanese government, when it entered into the treaty of 1894, and also when it entered into the treaty of 1911, knew that the United States had protested against the law of Mexico. It cannot be doubted that prior to entering into the treaty of 1911, which was concluded after the controversy in respect to the California schools, the Japanese government knew

of the position which the Secretary of State of the United States had taken in respect to the meaning of the treaty of 1894, and that while that treaty did not give affirmative rights to Japanese subjects in the California schools, its language negatived the right to make an invidious discrimination between resident Japanese aliens and other resident aliens. It is not to be assumed that when the United States made its protest against the enforcement of the Mexican law the United States was taking a legal and moral stand which it did not believe in, but to which it thought a weaker power might submit. On the contrary, it is reasonable to suppose that the United States believed that the discrimination in the Mexican law was an invidious discrimination and one which the Mexican government was not justified in making. The government of Japan, therefore, had the right to assume that the treaty of 1911 impliedly forbade any one of the states of the United States, while permitting ownership of land by resident aliens, to discriminate against Japanese subjects resident in such state by thereafter enacting a law which, had it been written into the treaty, would have effectually prevented the treaty being entered into by the government of Japan. If there is one proposition which plainly appears from the language of the

treaty of 1911 and by the declaration of the Ambassador from Japan to the United States, it is, that Japanese subjects were to stand on as high a plane and be accorded the same equality as citizens or subjects of the most favored nation. The declaration of the Japanese Ambassador, in respect to the limitation and control of the emigration of Japanese laborers to the United States, was not that the treaty controlled such emigration, but that the Japanese government was fully prepared to maintain with equal effectiveness the limitation and control which for the preceding three years it had exercised in regulation of such emigrant laborers. The Japanese government was not willing to bind itself by treaty that its emigrant laborers should stand upon a footing different from that of laborers from other countries, but that the Japanese government, as a matter of honor and not as a matter of treaty, would exercise in the future the same control it had exercised in the past. It is impossible, therefore, to believe that the treaty of 1911 would have been entered into by Japan if it had contained the provision that, notwithstanding the recital in the treaty that the two governments had resolved to enter into it in order to maintain the relations of amity and good understanding which happily existed, any state of the

United States might enact a law which would compulsorily and automatically exclude a subject of Japan resident in such state from purchasing, controlling or leasing real estate therein, while other alien residents of such state of a different race, color and place of nativity should have the option to acquire, control and lease land upon terms not permitted to the Japanese.

If the spirit of the treaty of 1911 forbids such discrimination as the law of Washington creates, then the discrimination cannot be enforced.

The President of the United States, in proclaiming that the treaty had become effective, declares that the treaty is made public "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

That the statute violates the spirit of the treaty and invidiously discriminates against the Japanese is manifest.

B

THE STATUTE OF WASHINGTON DENIES APPELLANTS THE EQUAL PROTECTION OF THE LAWS AND DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. The Japanese appellant is by the statute, because he is a Japanese born in Japan, disqualified from acquiring or leasing agricultural land in the State of Washington. Prior to the enactment of the statute there was no law of the State of Washington prohibiting an alien Japanese resident in Washington from leasing real estate for a term which would not be equivalent to a conveyance of the property; neither was there any law in the State of Washington making it a criminal offense for a citizen of Washington to convey land to an alien Japanese resident therein, nor making it an offense for such alien Japanese resident to accept such conveyance. In fact, the decisions of the Supreme Court of the State of Washington held that upon such a conveyance by a citizen to any alien the title passed out of the citizen to the alien and

the alien took a defeasible estate which could be attacked on the ground of alienage of the grantee only by the State of Washington in a proceeding to escheat the property.

Abrams v. State of Washington, 45 Wash. 327;

State ex rel. Atkinson v. World Real Estate Commerce Co., 46 Wash. 104;

In re Stixrud's Estate, 58 Wash. 339;
Prentice v. Howe, 84 Wash. 136.

The law of Washington is in accord with the law upon the subject announced by this court at a very early date in the history of the country.

Fairfax' Devisees v. Hunter's Lessee, 7 Cranch. 619.

To the same effect is the decision of the Supreme Court of California:

"Even a conveyance to an alien, disqualified under the law to hold real estate, has been generally held to convey title to such alien until the same is divested by the state by inquisition had upon its denouncement."

In *re Tetsubumi Yano's Estate*, 206 Pac. Rep. 995, 998.

The Washington statute under consideration, if valid, so changes the law that the conveyance or

lease of land made by an American citizen to an alien Japanese born in Japan and resident in the State of Washington, a crime, and the acceptance of such conveyance or lease by such Japanese a crime, and if such Japanese, having accepted a conveyance, refuses to disclose his title and interest in the property to the Attorney General of the state, he is guilty of a gross misdemeanor.

In determining whether the statute is in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it denies to the appellants the equal protection of the laws because it makes an illegal discrimination against them and their property, the same question is presented as to the proper construction of the statute which was presented in the consideration of the question whether the statute was in conflict with the treaty.

If the Fourteenth Amendment to the Constitution does prohibit the State of Washington from enacting a statute discriminating between alien residents, so that alien residents of the Caucasian race and alien residents of African nativity and African descent may purchase, control and lease land by performing an act voluntary on their part without being subjected to any penalty for such

purchase or acquiring such control or making such lease, and at the same time making it a crime for alien Japanese born in Japan, resident in the State of Washington to purchase, control or lease land, then, the statute under consideration is equally forbidden by the Fourtheenth Amendment, notwithstanding the language in which such intent is sought to be concealed without defeating the same result sought to be accomplished.

"The purpose of the lawmaker in the case supposed would be openly avowed. In the case existing, it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizens should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

Cummings v. State of Missouri, 4 Wall. 277, 325.

It is true that this language was used in the great case dealing with the question of whether or not the law of Missouri requiring a test oath and punishing a person for performing certain acts

without taking such oath was void under the constitution forbidding the enactment of *ex post facto* laws. The same principle, however, is involved in the present case in determining whether the court will consider the substance of the thing done by the legislature or be controlled by the form of language which the legislature has since seen fit to adopt to disguise the true intent sought to be accomplished and actually accomplished.

In the same decision, at page 329, this court said:

"Now, as the state, had she attempted the course supposed would have failed, it must follow that any other mode producing the same result must equally fail. The *provision of the federal constitution* intended to secure the liberty of the citizen *cannot be evaded* by *the form in which the power of the state is exerted.* If this were not so, if that which cannot be accomplished *by means looking directly to the end*, can be accomplished by *indirect means*, the inhibition may be *evaded at pleasure.* No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected."

At page 327, the court said:

"This deprivation is punishment; nor is it any less so because a way is *opened for escape* from it by the *expurgatory oath.* The framers of the constitution of Missouri knew at the time that *whole classes of individuals would be unable to take*

the oath prescribed. To *them there is no escape provided;* to *them* the deprivation *was intended to be and is absolute* and perpetual. To make the enjoyment of a right dependent upon an *impossible condition* is equivalent to the *absolute denial* of the right *under any condition;* and any such denial enforced for a past act is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else."

The statute under consideration applies to purchases and leases made prior to the time when the statute was enacted, as well as to purchases and leases made after its enactment. It makes the enjoyment of a defeasible estate, which had been created prior to the enactment of the statute, a crime and requires the alien Japanese resident to disclose to the Attorney General of the state and the Prosecuting Attorney, evidence of the commission of such crime. It was well known to the legislature of the State of Washington, when the statute was enacted, that almost all of the Japanese residents in the state would, because of their race, color and place of nativity, be absolutely unable to escape the status of statutory alienage, because the statute required the filing of a declaration under oath which it was a matter of common knowledge such Japanese could not in good faith file, and the statute intended, by prescribing such

standard, to so exclude such Japanese residents, while at the same time alien residents of other races would be permitted by their voluntary act to escape the unenviable status to which the Japanese were by the statute consigned. The law of the United States does not forbid alien Japanese residents, born in Japan, acquiring land or leasing it, either in the District of Columbia or in the territories of the United States. The Washington statute, instead of adopting a standard permitted by the laws of the United States for the lawful purchase or leasing of property by resident aliens in the District of Columbia and the territories of the United States, deliberately adopted as a standard, for the purpose of excluding the Japanese, a prohibitive provision of the naturalization laws of the United States, so that while the Japanese would be statutory aliens automatically and compulsorily, aliens of a different race should have the option to occupy or not occupy such status at their election.

2. Under the law, a conveyance to an alien vests in the alien a defeasible estate, subject to such alien being divested of such estate at the instance only of the state.

The filing of a declaration of intention to become a citizen of the United States does not convert an

alien into a citizen. The alien remains an alien until naturalization has been completed.

"A foreign subject, who is qualified to become a citizen of the United States under Sec. 2167 of the Revised Statutes, does not become such by filing his declaration of intention so to do. That section requires that he shall renounce allegiance to the sovereignty of which he is a subject; takes the oath of allegiance to the United States, and comply with the other conditions prescribed in the second and third paragraphs of Sec. 2165 of the Revised Statutes, in order to become naturalized; and until he does so he remains a foreign subject."

City of Minneapolis v. Reum, 56 Fed. 576, 581;

In re Kleibs, 128 Fed. 656;

In re Moses, 83 Fed. 995;

Maloy v Duden, 25 Fed. 673;

In re Polsson, 159 Fed. 283;

Frick v. Lewis, 195 Fed. 693.

The statute of Washington, therefore, in dealing with foreign citizens or subjects, divides them into two classes: Upon the favored class it confers the right to remain foreign citizens or subjects and to acquire, control and lease land. It prescribes a condition which it knew and intended would exclude Japanese from entering such class

because the condition prescribed for entering such class was one with which the Japanese could not, because of his race, color and place of nativity, comply.

3. Where an estate vests, to which is attached the obligation of performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee, the estate is freed from the condition.

Ruling Case Law, Vol. 8, Sec. 167, p. 1107;
Ruling Case Law, Vol. 28, Sec. 308, p. 320;
Davis v. Gray, 16 Wall., p. 230.

4. The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition and, therefore, the Japanese is by law freed from the obligation to comply in order to escape the penalty of the statute.

Endlich on Interpretation of Statutes, Sec. 441.

"A command which cannot be obeyed is not law, Therefore, possible obedience is an inseparable element in every law, without which it cannot exist. So, though a command should be such as could, in general, be carried out, if in a particular in-

stance it became impossible, it would not be law for that instance."

Bishop, Noncontract Law, Sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, Sec. 595.

"To make the enjoyment of a right dependent *upon an impossible condition* is equivalent to an *absolute denial* of the *right under any condition*."

Cummings v. Missouri, 4 Wall. p. 327.

4. The act under consideration, by requiring Japanese, in order to escape its penalties and the forfeiture of their estate, to do the impossible, while requiring of all European aliens and aliens of African nativity or African descent, compliance only with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In re Ah Chong, 2 Fed. 733;

In re Tiburcio, 1 Fed. 481.

The statute violates the rule of law announced by this court in *Guinn v. United States*, 238 U. S.

347. The rule there announced for ascertaining the meaning of the statute is the rule which is applicable in this case. At page 364 the court said:

"Its opening sentence fixes the literacy standard, which is all-inclusive, since it is general in its expression and contains no word of discrimination on account of race or color or for any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out changes coming under that standard from the inclusion in the literacy test, which would have controlled them but for the exclusion thus expressly provided for."

If the Washington statute had not prescribed that the filing of a declaration of intention to become a citizen of the United States should be the standard by which it should be determined whether an actual alien should or should not be a statutory alien, all aliens would have come under the provisions of the act; but by exempting those who should file such declaration from the class of statutory aliens and consigning to the class of statutory aliens compulsorily and automatically those for whom the filing of such declaration was an impossibility, there was, in effect, written into the act the proscription of the latter class.

At page 364 of the same opinion the court said:

"It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color or previous condition of servitude prohibited by the Fifteenth Amendment, but the *standard itself inherently brings that result into existence*, since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by, in substance and effect, lifting those conditions over to a period of time after the enactment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard which is fixed other than the purpose above stated."

It is impossible to conceive of any reason for the statute making the filing of a declaration of intention to become a citizen of the United States the test for avoiding the penalties of a criminal statute, for purchasing, controlling or leasing real estate in the State of Washington, except to give

the option to aliens of races other than Japanese and similar races, the right to escape the statutory alienage created by the statute, which statutory alienage the act intended to and did impose upon the Japanese and similar races because of race, compulsorily and automatically.

Meyers v. Anderson, 238 U. S. 368, is to the same effect.

5. A plainer case of making the purchase, control or leasing of land criminal by one class of persons on account of race, color and place of nativity, and perfectly lawful by persons of a different race, color and place of nativity, although both classes are residents of the same state, would be hard to find.

The fact that such difference in race, color and place of nativity is not a sound basis for classification for the exercise of the right to purchase, control and lease land is demonstrated by the fact that the laws of the United States which exclude the race discriminated against from becoming citizens of the United States, permits such race equally with other races to purchase, control and lease land in the District of Columbia and the territories of the United States.

U. S. Stat. at Large, Vol. 29, p. 618; and 33 p. 733.

Section 1977 of the Revised Statutes is as follows:

"All *persons* within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

It is a subterfuge to prescribe by statute a standard to be complied with by those of the white and black races which it is possible for them to comply with on account of their race, color and place of nativity and with which it is impossible for those of another race because of such race, color and place of nativity to comply and then say that because the same thing is required of the former races an alien who is not of either such race is not denied the protection of Section 1977 of the Revised Statutes in respect to the making and enforcing of contracts.

In *Buchanan v. Warley*, 245 U. S. 60, this court, at page 74, said:

"The Fourteenth Amendment protects life, liberty and property from invasion by the states with-

out due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property."

At page 76 of the same opinion the court said:

"While the principal purpose of the latter amendment (the Fourteenth) was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. It is now the settled law."

After quoting Sec. 1977 of the Revised Statutes the court in the same opinion, at page 78, said:

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it, for the sole reason that the purchaser is a person of color, intending to occupy the premises as a place of residence?"

At page 82 of the same opinion the court said:

"We think this attempt to prevent the alienation in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."

That the statute is void under the Fourteenth Amendment because it deprives both the alien plaintiff and the citizen plaintiffs in this case of their property without due process of law and denies them the equal protection of the law, is sustained by the following cases:

Buchanan v. Warley, 245 U. S. 60, 76;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352;

Yick Wo v. Hopkins, 118 U. S. 356;

Truax v. Raich, 239 U. S. 33, 39, 219 Fed, 273;

Barbier v. Connoly, 133 U. S. 27;

Allgeyer v. Louisiana, 165 U. S. 578, 589;

McFarland v. American Sugar Co., 241 U. S. 79;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

The Slaughter-house Cases, 16 Wall. 36;

Strauder v. West Virginia, 100 U. S. 303;

Revised Statutes, U. S., Section 1977;

Carey v. City of Atlanta, 143 Ga. 192;

State v. Julow, 129 Mo. 163, 29 L. R. A. 257;

Royster Guano Co v. Virginia, 253 U. S. 412;

In re Opinion of Justice, 94 N. E. 958.

"The Fourteenth Amendment to the Constitution is *not* confined to the protection of *citizens*. It says: 'Nor shall any State deprive any *person* of life, liberty, or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to *all persons with the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;* and the *equal protection of the laws* is a *pledge* of the *protection of equal laws.* It is accordingly enacted by Section 7977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the *same right in every State* and Territory to *make* and enforce *contracts*, to sue, be parties, give evidence, and to the full and *equal benefit of all laws* and proceedings for the *security of persons and property* as is enjoyed by *white citizens* and shall be subject to *like* punishment, pains, penalties, taxes, licenses, and exactions of every kind, *and to no other.*' "

Yick Wo v. Hopkins, Sheriff, 118 U. S. 356, 369.

Is equal protection of the law given to both when one man by reason of his race, color and place of nativity is made a criminal if he purchases, controls or leases land, so that therefrom he may eat bread in the sweat of his fact, while the other, at his option, may

by a mere declaration, because of his race, color or place of nativity, freely purchase, control or lease land to enable him to eat his bread?

Under what decision of this court can the claim be justly founded that an act, innocent in itself, may by a state law be made a crime in one because of his race, color or place of nativity, while the same act in another remains, at his option, an innocent act because of his race, color or place of nativity? We know of no such decision.

In this case the statute is not dealing with the right of a state to say who shall purchase, control or lease property of the state or any municipality of the state. Nor is any question involved of the right of the state to say that aliens of a particular class shall not work upon property belonging to the state or one of its municipalities. Nor does the case fall within the rule prohibiting aliens from hunting game belonging to the state. The question here involved is, whether a state which permits contracts of a certain character to be made by aliens, may lawfully except from the right to make such contracts a particular race of aliens who, because of their race, color and place of nativity, may not be naturalized under the laws of the United States. The question is also presented

whether a state may lawfully enact a statute depriving a citizen who is the owner of land of the right to sell or lease that land and receive the purchase money or rent therefor, although the conveyance or lease be made to a resident alien. The statute certainly deprives the citizen plaintiffs in the case at bar of their property without due process of law as effectually as the ordinance in the case of *Buchanan v. Warley* deprived the white man in that case of his property. The decision in the Buchanan case was not rested upon that provision of the Fourteenth Amendment which forbade the state to discriminate against any citizen of the United States because of race, color or previous condition. The ordinance was held invalid because in conflict with the Fourteenth Amendment, because the white man was a person and the Fourteenth Amendment forbade that a statute should deprive any person within its jurisdiction of property without due process of law. It is, we submit, unsound to claim that a statute which prescribed a standard whereby if an American citizen, the owner of land, sells or leases such land to one who is an alien under the laws of the United States he is doing only a lawful act if such alien has announced in a particular form his intention to become a citizen, while he becomes a criminal if he

makes a conveyance or leases his land to another alien because he is a Japanese and a native of Japan.

7. As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions by reason of the language of Subdivision A, Sec. 1, the entire act is invalid.

Butts v. Merchants and Miners Transp. Company, 230 U. S. 126;

McFarland v. American Sugar Company, 241 U. S. 79.

It is respectfully submitted that the decree of the District Court should be reversed, with directions to overrule the motion to dismiss and to enter a decree enjoining the enforcement of the statute because of its unconstitutionality.

Respectfully submitted,

JAMES B. HOWE,
E. HEISTER GUIE,
DALLAS V. HALVERSTADT,
Counsel for Appellants.

if the lease were made, alleging that the restriction violated the federal and state constitutions and conflicted with a treaty with Japan. *Held*, that the suit was within the equity jurisdiction of the District Court. P. 214.

2. State legislation withholding the right to own land in the State from aliens who have not in good faith declared their intention to become citizens of the United States, does not transgress the due process or equal protection clauses of the Fourteenth Amendment as applied to those aliens who, under the naturalization laws of Congress, are ineligible to citizenship, or as applied to citizens who desire to lease their land to such aliens. P. 216. *Truax* v. *Raich*, 239 U. S. 33, distinguished.

3. The treaty between the United States and Japan of February 21, 1911, 37 Stat. 1504, in granting liberty to the citizens and subjects of each party "to enter, travel and reside in the territories of the other, to carry on trade, . . . to own or lease and occupy houses, manufactories, warehouses and shops, . . . to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects," does not include the right to own, lease, or have any title to or interest in land for agricultural purposes, and the Washington statute above cited is not in conflict with it. P. 222.

4. As determined by the Supreme Court of the State, the Washington statute above cited is not in conflict with § 33, Art. II, of the state constitution. P. 224.

274 Fed. 841, affirmed.

APPEAL from a decree of the District Court dismissing a bill brought by the appellants to enjoin the attorney general of Washington from enforcing the state Alien Land Law.

Mr. James B. Howe, with whom *Mr. E. H. Guie* and *Mr. Dallas V. Halverstadt* were on the briefs, for appellants.

I. The case is within the equity jurisdiction. *Ex parte Young*, 209 U. S. 123; *Raich* v. *Truax*, 219 Fed. 273; *Truax* v. *Raich*, 239 U. S. 33; *Buchanan* v. *Warley*, 245 U. S. 60.

II. The state constitutional provision defines all disabilities of aliens respecting lands, and the legislature had no power to add thereto.

III. The act takes the property of the parties without due process of law, in that it prohibits the alien from following a common occupation of the community, and makes it a criminal offense for the landowners to avail themselves of his services in any capacity other than of a mere wage earner, and prohibits them from making a lawful use of their property. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Barbier* v. *Connolly* 113 U. S. 27; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Coppage* v. *Kansas*, 236 U. S. 1; *Truax* v. *Raich*, 239 U. S. 33; *Adams* v. *Tanner*, 244 U. S. 590.

If a citizen desires to employ an alien as superintendent of his agricultural operations, and the alien is willing to perform these duties, such a contract cannot be prohibited by the legislature. The compensation to be paid for such services is a matter of contract between the parties; it might be fixed at a percentage of the receipts resulting from such operation. It is equally clear that a citizen landowner, absenting himself from the scene of his agricultural operations, may lawfully contract with an alien to carry on the operations in the name of the landowner and for his use, and to account for the money received; and that the compensation of the alien may be a stipulated sum or a percentage of the receipts, as the parties agree. Now, suppose the landowner to enter into a contract by which the alien agrees to farm the land and pay the landowner a stipulated sum as his share of the profits. Can it be said that the alien is any the less engaged in working as a farm hand than he would be in any of the preceding illustrations? If it be suggested that in the last case an estate in land is created, the obvious answer is that the Supreme Court of the State, in *Tibbals* v.

Iffland, 10 Wash. 451, has held that a lease does not create an estate in land. The further obvious answer is that to create a legal distinction between the two acts is to relegate substance to form, contrary to all of the decisions of this Court on constitutional questions. See *Tieton Hotel Co.* v. *Manheim*, 75 Wash. 641; *O'Brien* v. *Webb*, 279 Fed. 117.

The prohibition of the act is contrary to the due process clause of the Fourteenth Amendment, because it is, is effect, a prohibition of the right of an alien to engage in one of the common occupations of life. The applicability of the due process clause to the right of the citizen landowner is no less clear. The Terraces acquired this property prior to the passage of the act, at a time when it might lawfully be leased to a Japanese, but the act now prohibits this by severe penalties. Their right to use their property in a lawful way, and enjoy its fruits, has been proscribed.

Each of the parties may urge the invalidity of the act from the viewpoint of the other. *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Truax* v. *Raich*, 239 U. S. 33; *Buchanan* v. *Warley*, 245 U. S. 60.

IV. The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end. *Buchanan* v. *Warley*, 245 U. S. 60.

The act divides aliens into two classes, namely, those who may, and those who may not, become citizens of the United States, extending to the former all rights of citizens with respect to real estate, upon the filing of a declaration of intention, while barring the latter class absolutely, because none of them can at any time in good faith file a declaration of intention. Excepting rights of the State (1) to prohibit the ownership of lands within its border, there being no treaty to the contrary, *Chirac* v. *Chirac*, 2 Wheat.

259; *Hauenstein* v. *Lynham*, 100 U. S. 483; *DeVaughn* v. *Hutchinson*, 165 U. S. 565; *Clarke* v. *Clarke*, 178 U. S. 186; *Blythe* v. *Hinckley*, 180 U. S. 333; (2) to limit the right to take the common property of the State, such as game and fish, to citizens of the State, *McCready* v. *Virginia*, 94 U. S. 391; *Patsone* v. *Pennsylvania*, 232 U. S. 138; (3) to employ none but citizens on public work, *Atkin* v. *Kansas*, 191 U. S. 207; *Heim* v. *McCall*, 239 U. S. 175; and (4) to limit the right of the franchise to citizens of the State, *Yick Wo* v. *Hopkins*, 118 U. S. 356; aliens are within the equal protection clause as fully as citizens. *Ex parte Virginia*, 100 U. S. 339; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Wong Wing* v. *United States*, 163 U. S. 228; *United States* v. *Wong Kim Ark*, 169 U. S. 649; *American Sugar Refg. Co.* v. *Louisiana*, 179 U. S. 89; *Truax* v. *Raich*, 239 U. S. 33; *Buchanan* v. *Warley*, 245 U. S. 60; *Re Tiburcio Parrott*, 1 Fed. 481; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552; *Re Ah Fong*, 3 Sawy. 144; *State* v. *Montgomery*, 94 Me. 192; *Templar* v. *Board*, 131 Mich. 254; *Opinion of Justices*, 207 Mass. 601; *Commonwealth* v. *Titcomb*, 229 Mass. 14.

The legislature being powerless to discriminate against aliens in favor of citizens and to classify upon the ground of alienage, how can it in reason be said that it may nevertheless discriminate against some aliens in favor of others, or classify aliens among themselves?

It is, of course, true that Congress may permit all aliens, or any class of aliens, less than all, to be naturalized, for whatever reason may seem to it sufficient or wise, being bound by no constitutional limitation on the subject. *United States* v. *Wong Kim Ark*, 169 U. S. 649. But it must be remembered that, in the matter of admitting aliens to naturalization, Congress was dealing with a political subject, and not a property right. The act in question deals not with political rights, but with property

rights, because, at common law, and in the State of Washington, prior to the enactment in question, aliens had the absolute right to lease real estate for a reasonable term, that is, a term sufficiently short to have no incident whatever of ownership, direct or indirect. 1 R. C. L. p. 823, § 33; *Winston* v. *Morrison*, 18 Wash. 664. In view of this, it is apparent that the act of Congress cannot be used as the basis of the classification attempted in the act of the State.

Game and fish are the property of the State, within the plenary power of the legislature, and their taking may be prohibited to all persons who are not citizens of the State, yet, in *Re Ah Chong*, 6 Sawy. 45, a statute of California prohibiting all aliens incapable of becoming electors of the State from fishing in the waters of the State, was held violative of the equal protection clause and the treaty with China. This case was cited with approval in *San Mateo* v. *Southern Pacific Ry. Co.*, 15 Fed. 722; *United States* v. *Balsara*, 180 Fed. 694; *Re Takai Maru*, 190 Fed. 45; *Raich* v. *Truax*, 219 Fed. 273; *Tragesser* v. *Gray*, 73 Md. 251; *Commonwealth* v. *Cosick*, 36 Pa. Co. Ct. Rep. 637; *Harper* v. *Galloway*, 58 Fla. 255. *Contra: Commonwealth* v. *Hanna*, 195 Mass. 262. See also *State* v. *Savage*, 96 Ore. 53; *Poon* v. *Miller*, 234 S. W. 573; *Estate of Yano*, 188 Cal. 645.

If every foot of land within the State of Washington should pass into the ownership or possession of aliens, as imagined by the court below, then little could be said in defense of the act as an expression of representative government. But the assumptions which are permissible to the legislature, when enacting a rule of conduct, do not include such a theoretical possibility. Again, the act of government forcing on a resident within its jurisdiction a condition which causes him to lack an interest in and power effectually to work for the welfare of the State, and then classifying him on the ground of the necessary

result of that condition, does not square with the doctrine of American fair play. The statement of the lower court that a difference, however arbitrary, might be availed of as a ground of classification by a State, bound by the equal protection clause of the Fourteenth Amendment, is directly contrary to the decisions of this Court.

The only legitimate end to be accomplished by the act in question is insuring that the rights in or to real estate, mentioned in the act, shall be exercised only by those persons who adhere and are attached to, and respect, our government and its institutions. Aliens of the proscribed class, resident in the State, may fulfill this requirement as completely as the most patriotic citizen in the State, but they are nevertheless proscribed by the act. No means are afforded by which the ultimate fact, which is the legitimate end of such legislation, can be determined, and the question is forever foreclosed by the statute, irrespective of the fact. See *Smith* v. *Texas*, 233 U. S. 630.

It cannot be said that the subjects of Russia and Turkey are attached to or respect the American Government or its institutions; or that the admission to citizenship of the Zulu, the Kaffir, the cannibals of the Congo and the tribes of Ashantee and Dahomey, contribute to the success and preservation of our government and civilization. China has been a republic for some years and has been recognized as such by our government, but the Chinese cannot be admitted to citizenship, and hence are denied the right of other aliens to lands in the State of Washington. Japan stands among the foremost nations today, not only in civilization, accomplishment, civic pride, but in all those national attributes which make her one of the great recognized powers. Her nationals, resident in America, are notably law-abiding and industrious, and actuated by civic pride which well might be emulated by American citizens. Many of them have been residents of the State for years, have made it their permanent homes.

When an act, which concededly must have a substantial relation to the determination of the existence or absence of adherence and attachment to and respect for American institutions and the American Government, so utterly fails to accomplish that purpose, how can it be said that it is other than an arbitrary fiat formulated in utter disregard of the facts?

The vice of this act is that it makes a class within a class. *State* v. *Julow*, 129 Mo. 163; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *McFarland* v. *American Sugar Refg. Co.*, 241 U. S. 79. A valid classification must have a reasonable relation to a legitimate end of government, and a classification which has no tendency to the accomplishment of that purpose is void.

White men, black men, red men, and brown men are very different, and there is a vast difference between a man of wealth and a poverty-stricken man, but a rule of conduct based upon such differences would be clearly invalid. *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Tanner* v. *Little*, 240 U. S. 369; *Constantini* v. *Darwin*, 102 Wash. 402.

V. The impossibility of compliance with the act by a Japanese frees him from the obligation to comply. Endlich, Interpretation of Statutes, § 441; Bishop, Non-contract Law, § 156; Bishop, Contracts, § 595.

VI. The act is contrary to Art. I of the existing treaty between the United States and Japan, in that it prohibits Japanese subjects, resident in the State, from carrying on therein trade, from leasing land for commercial purposes and from doing the things necessary or incident to trade upon the same terms as native citizens or subjects. The treaty should be interpreted frankly and liberally to avoid invidious distinctions.

This alien being engaged in wholesale and retail trade in farm products, producing the farm products is a com-

mercial purpose and is incident to or necessary for trade therein. As to the meaning of the term "trade", see *Schooner Nymph*, 1 Sumn. 517; *May* v. *Sloan*, 101 U. S. 231; *Colby* v. *Dean*, 70 N. H. 591; *Jackson* v. *Town of Union*, 82 Conn. 266; *State v. North*, 160 N. C. 1010; *Smith* v. *Cooley*, 65 Cal. 46; *Finnegan* v. *Knights of Labor Bldg. Assn.*, 52 Minn. 239. These authorities show that the term "trade" is not always given a narrow meaning, but that its meaning is determined according to the apparent intention of the parties to the instrument in which it is used.

Mr. L. L. Thompson, Attorney General of the State of Washington, with whom *Mr. E. W. Anderson* was on the brief, for appellee.

I. It is submitted that there is no jurisdiction in equity, under *Boise Water Co.* v. *Boise City*, 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481; *Dalton Adding Machine Co.* v. *Virginia*, 236 U. S. 699; *Cavanaugh* v. *Looney*, 248 U. S. 453. Neither can the jurisdiction be sustained on account of the severity of the penalty, under *Ex parte Young*, 209 U. S. 123. See *Tanner* v. *Little*, 240 U. S. 369.

II. Power to prohibit leases of this character was not denied by the state constitution. This Court is bound to accept the construction of that constitution adopted by the highest court of that State.

III. The argument that the transaction in question cannot be prohibited, under the Fourteenth Amendment assumes that the case is to be determined entirely by the general rules which obtain in ordinary police power cases. Even though that assumption be accepted the legislative action under consideration is sustainable.

The argument fails to distinguish between the particular thing here involved and the average occupation in which an alien might desire to engage; and is based

upon too broad a conception of the scope of the due process clause with reference to aliens, as applied in *Truax* v. *Raich*, 239 U. S. 33.

The validity of the particular restriction now before the Court, if the act be considered as an ordinary police measure, depends upon its relation to the public welfare, and is not determined by any announced conclusions of this Court with respect to the rights of aliens to follow other and different occupations. Concretely, the question is whether the Court can say that the public welfare could not be injuriously affected by the leasing of real property to persons who owe to the State and Nation no obligations of allegiance.

While the common law cannot justify the denial of a constitutional right, the fact that both the common law and the statute are in accord affords a cognate reason why the statute should be sustained. The public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception. Coke Upon Littleton, Bk. 1–2b; 1 Black. Com. 372; 2 Kent. Com., 14th ed., 53–64; Kerr, Real Property, 215 et seq.; Tiffany, Real Property, 2350; 1 Stimson's Am. St. Law, 6013; 1 Stephens, Com. on Law of England, 330–376; Sedgewick, Trial of Title, 226; 1 Washburn, Real Property, 131; *Halter* v. *Nebraska*, 205 U. S. 34; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Jacobson* v. *Massachusetts*, 197 U. S. 11. The application of this rule to the question of the desirability of allowing aliens to possess dominion over the soil, will show that the preponderant public opinion of the country has always been opposed to this, and that this opinion has been particularly intensified in recent years. [Citing Wheaton, Int. Law, 5th ed., p. 138, note, and numerous

state statutes.] Congress has always limited the right to appropriate the unoccupied public domain to citizens or to persons who have filed declarations of intention to become such. Rev. Stats., § 2289. See also the acts respecting ownership of land in the Territories, and especially in Hawaii. 29 Stat. 618; 31 Stat. 154. It appears that aliens are not permitted to own real property in Japan. DeBecker's Annotated Civil Code of Japan, vol. 1, pp. 7, 238, 242.

This course of legislation indicates a uniform popular view that the public welfare is directly affected by the alien ownership of realty. It is particularly noteworthy that the most drastic action in this regard has been taken by those States in which there are found large bodies of aliens who are not permitted by Congress to become naturalized. Presumably, this legislation is the result of experience and of a more intimate knowledge of local conditions than the Court can obtain by the exercise of its judicial knowledge. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 160.

This Court has consistently recognized the power of the States with respect to the ownership of land by aliens. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cr. 603; *Chirac* v. *Chirac*, 2 Wheat. 259; *Orr* v. *Hodgson*, 4 Wheat. 453; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413; *Taylor* v. *Benham*, 5 How. 233; *United States* v. *Repentigny*, 5 Wall. 211; *Blythe* v. *Hinckley*, 180 U. S. 333; *Truax* v. *Raich*, 239 U. S. 33; *Geofroy* v. *Riggs*, 133 U. S. 258; *Donaldson* v. *State*, 182 Ind. 615; 22 R. C. L. 83; 2 C. J. 1048; *Jones* v. *Jones*, 234 U. S. 615. The common law rule was in accord with the law of nations as recognized by all civilized countries. Wheaton, Int. Law, 5th ed., 132; Foelix, Droit International Privé, § 9; Vattel, Law of Nations (Chitty's ed.) p. 177; Coke Upon Littleton, Bk. 1–2b; 1 Black. Com. (Cooley's ed.) p. 669. If the power to pro-

TERRACE ET AL. *v.* THOMPSON, ATTORNEY GENERAL OF THE STATE OF WASHINGTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 29. Argued April 23, 24, 1923.—Decided November 12, 1923.

1. A Washington statute (c. 50, Laws 1921,) disqualifies aliens who have not in good faith declared intention to become citizens of the United States from taking or holding interests in land in the State for farming or other purposes not excepted, and provides that upon the making of such prohibited conveyance the land shall be forfeited to the State and the grantors be subject to criminal punishment, and the alien also, if he fail to disclose the nature and extent of his interest. Citizens owning land in Washington and an alien Japanese, desirous of consummating a lease to the alien for farming, sued to enjoin the state attorney general from taking criminal and forfeiture proceedings, as he threatened

hibit the holding of the fee simple title by an alien rests in the police power, then the same rule would, of course, apply to leases. The prosperity of the State must rest in large measure upon obligations incident to citizenship and national allegiance. The possession of the soil by persons who recognize no such obligations but who are bound only by specific statutory mandates thus has a direct relation to the public welfare. The importance of this is more marked in a nation whose governmental power is restricted by constitutional limitations than in an autocratic community. The fact that there is no relation between the employment of aliens in ordinary transitory occupations and the public welfare by no means compels the same conclusion where there is involved sovereignty over the soil, a thing upon which our political existence may well depend. The contention that because the situations have a surface similarity and that therefore the Fourteenth Amendment operates in the same degree in both instances, is simply another one of the oft-repeated attempts to define and limit the police power by specific definition and limitation. This Court has always consistently refused to do this. *Munn* v. *Illinois*, 94 U. S. 113. The police power is not restricted to emergency regulations, such as health measures, but extends to measures designed to subserve the public welfare and prosperity. *Barbier* v. *Connolly*, 113 U. S. 27; *Chicago, Burlington & Quincy Ry. Co.* v. *Illinois*, 200 U. S. 561; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. The ownership of large parcels of realty by aliens may be dangerous to the public welfare of a State for many possible reasons. Unless the Court can see that the reasons for the law are illusory, the legislative action must be sustained.

It will probably be said in response to this that some of these reasons, such as the economic competition of foreign labor, might have been urged in support of the act

declared invalid in *Truax* v. *Raich*, 239 U. S. 33. We think that possibility would not dispose of the question. Once within our borders, an alien cannot be deprived of the right to live, and to live must labor or be supported by the charity of others. An interference with that right under the police power is, therefore, subject to certain limitations, the exact nature of which need not be specifically designated. The Arizona statute applied to all occupations, irrespective of their nature. The practical effect, as pointed out in the opinion, was to exclude aliens from the State,—a subject entrusted to Congress.

In the field of agriculture the American and Oriental cannot compete. The possible result of such a condition would be that in the course of time, in certain sections of the country, at least, all lands might pass to these classes of aliens. The people of the State would then be entirely dependent for their very existence upon alien races who recognize to the State or Nation no other obligations than those forcibly imposed.

Whether, under the laws of Washington, a lease creates an interest in real estate, is not material. It can make no difference whether a lease be viewed as an interest in realty or as personal property. But leases have always been regarded in Washington as conveying an interest in land.

This, however, is not an ordinary police power case. The power exercised is broader than exists over the right of a citizen to follow the ordinary pursuits of life; it need not be justified by concrete instances of apprehended dangers, but should simply be recognized as one of the necessary incidents of governmental existence. Every writer on the law of nations and all civilized countries have recognized its existence since the beginning of history. It is a part of the sovereignty of a State, and of a kind, we submit, never intended to be taken away by the Fourteenth Amendment.

IV. Equal protection of the laws. The mere statement of the cause for the exercise of the power in this instance would seem to prevent any question of classification from arising, because the statute includes the entire field which occasioned the exercise of the power. The justification for the act under the police power does not rest upon the racial characteristics, or upon the idea that the excluded classes may not be law abiding and industrious. The regulation is occasioned by the legislative view that persons who are not at least morally bound by obligations of citizenship should not be permitted to obtain control of a thing so vital to the political existence of a State as is the land. The question of whether certain persons should be permitted to assume those obligations is entirely legislative, and consequently immaterial here. It is sufficient that Congress has refused to extend those privileges to certain races. It can make no difference whether their refusal to recognize those obligations is occasioned by deficiencies in their character or by an act of Congress. The result is the same in either case in so far as the public welfare of the State is concerned; that is to say, a thing upon which the State depends for its existence passes into the hands of persons who recognize no voluntary obligations to it.

The police power of the State extends to all subjects which affect the public welfare and the alleged fact that, if the National Government had acted differently, the occasion for the exercise of the power would not have arisen, is of no relevancy. This factor marks the distinction between the case of *Truax* v. *Raich, supra; Yick Wo* v. *Hopkins,* 118 U. S. 356, and various decisions of state and lower federal courts holding invalid, attempts to deprive aliens of the right to engage in various occupations and the case at bar.

Declarants in good faith are included in the same class as citizens, because they have taken the preliminary steps

looking to citizenship and presumably will, in due course, attain that citizenship. The fact that, to a greater or less extent, the same danger may be common to two classes of persons would not for that reason render a regulation directed at one class only, void. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Miller* v. *Wilson,* 236 U. S. 373; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224; *International Harvester Co.* v. *Missouri,* 234 U. S. 199. There is an obvious difference between the service to the State to be expected from a person who has been permitted in a formal way to declare his intention to abandon his allegiance to another nation, and one who has not taken that step.

V. The act is not in conflict with the treaty.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellants brought this suit to enjoin the Attorney General of Washington from enforcing the Anti-Alien Land Law of that State, c. 50, Laws, 1921, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment; with the treaty between the United States and Japan, and with certain provisions of the constitution of the State.

The appellants are residents of Washington. The Terraces are citizens of the United States and of Washington. Nakatsuka was born in Japan of Japanese parents and is a subject of the Emperor of Japan. The Terraces are the owners of a tract of land in King County which is particularly adapted to raising vegetables, and which for a number of years had been devoted to that and other agricultural purposes. The complaint alleges that Nakatsuka is a capable farmer and will be a desirable tenant of the land; that the Terraces desire to lease their land to him for the period of five years; that he desires to accept such lease, and that the lease would be made but

for the act complained of. And it is alleged that the defendant, as Attorney General, has threatened to and will take steps to enforce the act against the appellants if they enter into such lease, and will treat the leasehold interest as forfeited to the State, and will prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act, and that, unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied the equal protection of the laws.

The Attorney General made a motion to dismiss the amended complaint upon the ground that it did not state any matters of equity or facts sufficient to entitle the appellants to relief. The District Court granted the motion and entered a decree of dismissal on the merits. The case is here on appeal from that decree.

Section 33 [1] of Article II of the Constitution of Washington prohibits the ownership of land by aliens other than those who in good faith have declared intention to become citizens of the United States, except in certain

[1] Section 33. The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.

instances not here involved. The act [2] provides in substance that any such alien shall not own, take, have or hold the legal or equitable title, or right to any benefit of any land as defined in the act, and that land conveyed to or for the use of aliens in violation of the state constitution or of the act shall thereby be forfeited to the State. And it is made a gross misdemeanor, punishable by fine or imprisonment or both, knowingly to transfer land or the right to the control, possession or use of land to such an alien. It is also made a gross misdemeanor for any such alien having title to such land or the control, possession or use thereof, to refuse to disclose to the Attorney General or the prosecuting attorney the nature and extent of his interest in the land. The Attorney General and the prosecuting attorneys of the several counties are charged with the enforcement of the act.

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[2] Section 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire-clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof. . . .

(d) To "own" means to have the legal or equitable title to or the right to any benefit of;

(e) "Title" includes every kind of legal or equitable title;

Section 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

1. The Attorney General questions the jurisdiction of the court to grant equitable relief even if the statute be unconstitutional. He contends that the appellants have a plain, adequate and speedy remedy at law; that the case involves but a single transaction, and that, if the proposed lease is made, the only remedy which the State has, so far as civil proceedings are concerned, is an escheat proceeding in which the validity of the law complained of may be finally determined; that an acquittal of the Terraces of the criminal offense created by the statute would protect them from further prosecution, and that Nakatsuka is liable criminally only upon his failure to disclose the fact that he holds an interest in the land.

The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 281; *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, 11, 12. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Truax* v. *Raich*, 239 U. S. 33, 37, 38. See also *Ex parte Young*, 209 U. S. 123, 155, 162; *Adams* v. *Tanner*, 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban*

R. R. Co., id. 499, 506; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217.

The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes (*Buchanan* v. *Warley*, 245 U. S. 60, 74), and the Constitution protects these essential attributes of property (*Holden* v. *Hardy*, 169 U. S. 366, 391), and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life. *Truax* v. *Raich*, *supra*; *Meyer* v. *Nebraska*, 262 U. S. 390. If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them

in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. *Truax* v. *Raich, supra.* They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.

2. Is the act repugnant to the due process clause or the equal protection clause of the Fourteenth Amendment?

Appellants contend that the act contravenes the due process clause in that it prohibits the owners from making lawful disposition or use of their land, and makes it a criminal offense for them to lease it to the alien, and prohibits him from following the occupation of farmer; and they contend that it is repugnant to the equal protection clause in that aliens are divided into two classes,—those who may and those who may not become citizens, one class being permitted, while the other is forbidden, to own land as defined.

Alien inhabitants of a State, as well as all other persons within its jurisdiction, may invoke the protection of these clauses. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; *Truax v. Raich, supra,* 39. The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their

right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683; *In re Kemmler*, 136 U. S. 436, 449; *Lawton* v. *Steel*, 152 U. S. 133, 136; *Phillips* v. *Mobile*, 208 U. S. 472, 479; *Hendrick* v. *Maryland*, 235 U. S. 610, 622, 623. And in the exercise of such powers the State has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

And, while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders. *Hauenstein* v. *Lynham*, 100 U. S. 483, 484, 488; *Blythe* v. *Hinckley*, 180 U. S. 333, 340. Mr. Justice Field, speaking for this Court (*Phillips* v. *Moore*, 100 U. S. 208) said (p. 212):

"By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government." [3]

[3] In *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603, 609, 619, 620, it was said, per Story, J.: "It is clear by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. . . . In the language of the ancient law, the alien has the capacity to *take*, but not to *hold* lands, and they may be seized into the hands of the sovereign." See also 1 Cooley's Blackstone (4th ed.) 315, *372; 2 Kent's Commentaries (14th ed.) 80, *54.

State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. *In re Kemmler, supra; Giozza* v. *Tiernan,* 148 U. S. 657, 662. But this does not forbid every distinction in the law of a State between citizens and aliens resident therein. In *Truax* v. *Corrigan,* 257 U. S. 312, this Court said (p. 337):

"In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. . . . Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the States the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress,[4]

[4]Act of March 3, 1863, c. 75, 12 Stat. 731; Act of April 22, 1898, c. 187, 30 Stat. 361; Act of January 21, 1903, c. 196, 32 Stat. 775; Act of June 3, 1916, c. 134, §§ 57, 111, 39 Stat. 197; Act of May 18, 1917, c. 15, § 2; Act of July 9, 1918, c. 143; Act of August 31, 1918, c. 166, 40 Stat. 76, 884, 955.

declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of Article I of the treaty invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared bona fide intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein [5] markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

By the statute in question all aliens who have not in good faith declared intention to become citizens of the United States, as specified in § 1 (a), are called "aliens," and it is provided that they shall not "own" "land," as defined in clauses (d) and (b) of § 1 respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or

[5] Act of June 29, 1906, c. 3592, 34 Stat. 596, as amended, Act of June 25, 1910, c. 401, 36 Stat. 829.

against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent.[6] Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws,—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the

[6] Act of July 14, 1870, c. 254, § 7, 16 Stat. 256, as amended, Act of February 18, 1875, c. 80, 18 Stat. 318; *Ozawa* v. *United States*, 260 U. S. 178; *United States* v. *Thind*, 261 U. S. 204.

realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens."

And we think it is clearly within the power of the State to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may but who will not naturalize are obvious.

Truax v. *Raich, supra,* does not support the appellants' contention. In that case, the Court held to be repugnant to the Fourteenth Amendment an act of the legislature of Arizona making it a criminal offense for an employer of more than five workers at any one time, regardless of kind or class of work, or sex of workers, to employ less than eighty per cent. qualified electors or native born citizens of the United States. In the opinion it was pointed out that the legislation there in question did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease.

The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

3. The state act, in our opinion, is not in conflict with the treaty [1] between the United States and Japan. The preamble declares it to be "a treaty of commerce and navigation", and indicates that it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.

The only provision that relates to owning or leasing land is in the first paragraph of Article I, which is as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

For the purpose of bringing Nakatsuka within the protection of the treaty, the amended complaint alleges that, in addition to being a capable farmer, he is engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, interstate and foreign commerce, and, instead of purchasing such farm products, he has produced, and desires to continue to produce, his own farm products for the purpose of selling them in such wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing farm products for such trade he will be prevented from engaging in trade and the incidents to trade, as he is authorized to do under the treaty.

[1] 37 Stat. 1504–1509.

To prevail on this point, appellants must show conflict between the state act and the treaty. Each State, in the absence of any treaty provision conferring the right, may enact laws prohibiting aliens from owning land within its borders. Unless the right to own or lease land is given by the treaty, no question of conflict can arise. We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or subjects of either in the territories of the other. The right to "carry on trade" or "to own or lease and occupy houses, manufactories, warehouses and shops", or "to lease land for residential and commercial purposes", or "to do anything incident to or necessary for trade" cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices in our opinion to negative the claim asserted by appellants that it conflicts with the state act.

But if the language left the meaning of its provisions doubtful or obscure, the circumstances of the making of the treaty, as set forth in the opinion of the District Court (*supra*, 844, 845), would resolve all doubts against the appellants' contention. The letter of Secretary of State Bryan to Viscount Chinda, July 16, 1913, shows that, in accordance with the desire of Japan, the right to own land was not conferred. And it appears that the right to lease land for other than residential and commercial purposes was deliberately withheld by substituting the words of the treaty, "to lease land for residential and commercial purposes" for a more comprehensive clause

contained in an earlier draft of the instrument, namely, "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

4. The act complained of is not repugnant to § 33 of Article II of the state constitution.

That section provides that "the ownership of lands by aliens . . . is prohibited in this State . . .". Appellants assert that the proposed lease of farm land for five years is not "ownership", and is not prohibited by that clause of the state constitution and cannot be forbidden by the state legislature. That position is untenable. In *State* v. *O'Connell*, 121 Wash. 542, a suit for the purpose of escheating to the State an undivided one-half interest in land, or the proceeds thereof, held in trust for the benefit of an alien, a subject of the British Empire, decided since this appeal was taken, the Supreme Court of Washington held that the statute in question did not contravene this provision of the constitution of that State. The question whether or not a state statute conflicts with the constitution of the State is settled by the decision of its highest court. *Carstairs* v. *Cochran*, 193 U. S. 10, 16. This Court "is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State". *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448, and cases cited.

The decree of the District Court is affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.